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TRANSFER OF PROPERTY,

ACT IV OF 1882.

With the discussions and proceedings of the India Council, short marginal notes and references to the Statutes, Acts, and reported decisions of the Indian High Courts, the Judicial Committee &c. &c.; and a copious Index.

BY

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TRANSFER OF PROPERTY ACT.

ACT IV OF 1882.

INTRODUCTION.

Abstract of the Proceedings of the India Council held at Government House on Thursday the 26th January 1882.

THE Hon'ble MR. STOKES presented the final Report of the Select Committee on the Bill to define and amend the law relating to the Transfer of Property.

The Hon'ble MR. STOKES also moved that the further and final Reports of the Select Committee on the Bill to define and amend the law relating to the Transfer of Property be taken into consideration. He said that only six of the amendments described in those Reports were of sufficient importance to require mention in this Council. The Committee had declared that nothing in Chapter II should be deemed to affect any rule of Hindú, Muhammadan or Buddhist law. It did not, in his opinion, affect any such rule, otherwise than by putting Natives, as regards their power to make settlements on unborn persons, on the same footing as Europeans. But it laid down, in accordance with the decisions of the Courts, a rule against perpetuities, and two of the Native members who much disliked this rule, and who thought that judge-made law was more likely to be altered than statutory law, pressed the Committee to exempt their personal law from this chapter. They had also saved the

rules of Hindú and Buddhist law from the provisions of the chapter on gifts, save only that which required, in the case of a gift of land, writing, registration and attestation. The rule that a Hindû father might, in case of necessity, resume gifts made to his son (*Dháyabhága*, II, 57), would thus remain unaffected.

Section 70 of the Bill as referred to the Committee recognized the validity of a power of sale conferred by a mortgage-deed where the principal-money originally secured was five hundred rupees or upwards. They were of opinion that there were parts of the country in which such a power was liable to be abused by Native mortgagees, and they considered it safer to provide that such powers should be valid only, first, where the mortgage was an English mortgage(as defined by theBill) and neither mortgagor nor mortgagee was a Hindú, Muhammadan or Buddhist; secondly, where the mortgagee was the Secretary of State in Council, or thirdly, where the mortgaged property, or any part thereof, was situate in the Presidency-towns, Karàchì or Rangoon. They had amended the section accordingly, and they had taken the opportunity to declare that the provisions of the Trustees and Mortgagees Act, 1866, should be deemed to apply to English mortgages wherever in British India the mortgaged property might be situate, when neither of the parties was a Native. As to this, it appeared there was some doubt, owing to the ambiguity of the expression "cases to which English law is applicable," which was found in Act XXVIII of 1866, section 45.

They thought that the provisions of section 38 (as to the apportionment of obligations relating to property on its severance) might possibly sometimes cause hardship in the case of agricultural leases. They had, therefore, provided that nothing in that section should apply to such leases unless and until the Local Government so directed.

After section 56, they had inserted a section, taken from the

Property Act, 1881 (44 & 45 Vic., c. 41, s. 5), giving the Court power, in the case of sale of immoveable property subject to any incumbrance, to provide for the incumbrance and to direct that the property should be sold freed therefrom. In case of an annual or monthly sum charged on the property, this would be done by paying into court such amount as, when invested in Government securities, the Court considered would be sufficient, by means of the interest, to keep down the charge. In case of a capital sum charged, the amount to be paid into court would be such as would be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court might declare the property free from the incumbrance and make proper orders for giving effect to the sale and for applying the capital or income of the fund in court. This section had been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property; and there was reason to believe that it would be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Committee had taken two precautions: first, it had confined the jurisdiction to the High Courts, the District Courts and any other Courts specially empowered by the Local Governments. And, secondly, they had declared that an appeal should lie from all directions and orders given under this section.

They had re-drafted the last paragraph of section 71 of the same Bill (now 73), and added a provision limiting the amount for which a mortgagee might, in the absence of a contract to the contrary, insure the mortgaged property against loss or damage by fire. This also was in accordance with the same Statute, section 23.

They had not extended the Act in the first instance to Bombay, the Panjáb or British Burma, as the present Local Governments of those provinces did not wish it to apply to the territories under their administration. But they had empowered them to extend the Act to the whole or any part of those

territories ; and they had authorised every Local Government to exempt, throughout the whole or any part of the territories administered by it, the members of any specified race, sect, tribe or class from all or any of the provisions relating to transfer by an ostensible owner (section 41). and the mode of effecting a transfer by sale (section 54, paragraphs 2 and 3), by mortgage (section 59), by lease (section 108), and by gift (section 124). This exemption might be retrospective from the day on which the Act came into force. They thought that the proposed Act should not come into force till the 1st April, so that time might be given to the Courts and the public to become familiar with its provisions, especially those requiring written instruments in case of sales, mortgages, leases, gifts and exchanges.

And now, having mentioned the changes recently made by the Select Committee, it would be convenient to say a few words as to this important Bill and its history.

The primary object of the Bill was, as MR. STOKES had explained to the Council nearly five years ago, when no one who now heard him was present, to complete the Code of Contract Law (Act IX of 1872), so far as related to immoveable property, and thus to carry out to some extent the policy of codification which the Government of India had happily resumed. Its secondary object was to bring the rules which regulated the transmission of property between living persons into harmony with certain rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which this Council commenced by passing the law of succession (Act X of 1865), continued by passing the Hindú Wills Act (XXI of 1870) for the Lower Provinces and the Presidency-towns, and would soon, he hoped, end by extending the latter Act to Hindús and Buddhists in the rest of India. Another object of the Bill was to amend the law of mortgages and conditional sales, which had, at least in Madras and Bombay, got into a somewhat unsatisfactory condition.

The Bill was originally framed by the Law Commission, to which the Government were indebted for the Succession Act and for all that was good in the Contract Act (IX of 1872), and which then comprised the late Master of the Rolls, Lord Romilly, Sir Edward Ryan, formerly Chief Justice of Bengal, Mr. Lowe (now Lord Sherbrooke), Sir Robert Lush, Sir John MacLeod, the distinguished Madras Civilian who helped Macaulay in framing the Penal Code, and the late Lord Justice Sir W. M. James: all now gone except Lord Sherbrooke. It was sent out in 1870 by the Duke of Argyll, then Secretary of State for India, with instructions to take the necessary steps for passing it into law. In 1876, towards the close of Sir Arthur Hobhouse's tenure of office, when he had become convinced of the expediency and practicability of codifying the substantive law of this country, he took up this Bill and carefully revised it, and some of the points with which it dealt were discussed and settled in the Executive Council. The sections on Powers, which the Bill then contained, were re-drawn by him. The Bill, thus revised, was sent home early in 1877, and in the following April the Government received permission to proceed with it. Sir A. Hobhouse having left India, the Bill fell into MR. STOKES' hands, and was subjected to renewed examination by his learned friend Mr. Phillips, then Legislative Secretary, and himself. In June 1877, he introduced the Bill, and the Council referred it to a Select Committee, composed of Sir Edward Bayley, Sir A. Arbuthnot, Mr. Cockerell and Mahárájà Jotindra Mohan Tagore, to whom his learned friends Messrs. Paul and Evans were subsequently added. The Bill was then circulated to the Local Governments for publication and translation, and numerous valuable criticisms and suggestions came in from all parts of India.

In February, 1878, the Committee presented a preliminary report, stating that, in revising this important measure, they had been guided by the three principles by which the Govern-

ment of India desired to regulate its policy of codification, namely, first, that as little change as possible should be made in the existing law, whether established by the legislature or declared by judicial decisions; secondly, that no additions should be made to the law which were not either necessary or clearly expedient; and, thirdly, that interference with contracts fairly made and usages long established was, *primâ facie*, undesirable. They had also borne in mind the great deference due to the late Indian Law Commission, by whom the bulk of the Bill was framed, and to Sir Arthur Hobhouse, by whom it had been settled.

In 1878 the Bill thus revised was republished, and again circulated to the Local Governments, and another mass of criticism was received.

The principal objections taken to this Bill in its second form were, first, that, as a whole, it was heterogeneous, and, secondly, that certain parts of it were neither necessary nor expedient. It was said, for instance, that, though the bulk of the Bill dealt with transfer of property *inter vivos* by act of parties, it also treated of conditions in wills, and of succession to a deceased person. It was said, again, that the chapters dealing respectively with the rights and liabilities of owners of limited interests and with property held by several persons belonged rather to the subject of the enjoyment, than to that of the transfer, of property. It was urged that settlements (in the conveyancer's sense of the word) were hardly ever made in India; that what are technically called "powers" were almost unknown; and that the chapters dealing with those subjects were certainly not necessary, and could hardly be said to be expedient. The Committee felt the force of these objections. In fact, they had always felt them. But they were not responsible for the first draft of the Bill, whatever were its excellences or defects. The matters thus objected to, together with others, such as registration and trusts, still more foreign to the proper subject of the

Bill, were all dealt with by the draft prepared by the late Indian Law Commission and revised by Sir A. Hobhouse. The great deference due to the Law Commission and to Sir A. Hobhouse had hitherto prevented the Committee from dealing freely with the Bill. Until the opinions of the Local Governments and the results of local experience had been obtained, for them to have altered it would have been to set their individual views against those of the able and learned men who were answerable for the Bill as introduced. But now that these opinions and results had been obtained, the Committee saw that if the Bill was to go on at all, it must be strictly confined to the subject of transfer of property by act of parties, that was to say, by contract or gift.

They had, therefore, omitted chapters VII to XII, both inclusive, which dealt with settlements, powers and the other matters just mentioned.

They added, on the margins, references to the reported decisions of the Indian Courts and the Judicial Committee, which justified the rules contained in the Bill. The Council would see that but few of these rules were devoid of this valuable support. The assertion that the Bill would introduce a mass of new law into India must, therefore, be due to ignorance of the extent to which English law (under the name of justice, equity and good conscience) was actually administered to the Natives by the Anglo-Indian Courts. The function of the Bill, like that of all Indian Codes, was to strip English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population, and could be easily administered by non-professional judges. But the Bill would introduce hardly any new substantive law, and it would not (except in the case of the procedure relating to mortgages) displace any existing enactment. The rules, for instance, as to the relation of landlord and tenant, contained in the local Acts, X of 1859, XVIII of 1873, XIX of 1868, XXVIII

of 1868, Bengal Act VIII of 1869 and Madras Act VIII of 1865, would all remain untouched.

To the body of local usages and contractual incidents which in India, as in other countries, existed as to the transfer of land, the tenderest care was shewn by the Bill. Not only was local usage expressly saved in the sections 98, 106 and 108. but the effect of section 2, clause (*a*), would be to maintain intact the statutory force which the legislature had given to local usage in those two *pays de coutumes*, the Panjáb and Oudh ; and throughout India all the many incidents of a mortgage or a lease, which were not inconsistent with the provisions of the Bill, would remain wholly unaffected.

The Bill was then simultaneously circulated for the third time to the Local Governments, and referred to a Commission, composed of Sir Charles Turner, the present Chief Justice of Madras, Mr. Justice West of the High Court of Bombay and himself.

The Commission made several amendments, both in the wording and substance of the Bill, but the important additions were only three. First, they set out in full on the face of the Bill, several rules applying to transactions between living persons, which in the original draft were only expressed by way of reference, *mutatis mutandis*, to certain sections of the Succession Act dealing with matters such as election, contingent bequests, conditional bequests and bequests with directions as to application and enjoyment, and which, therefore, could never have been applied by unprofessional Judges without risk of serious error. Secondly, they required, at the suggestion of Sir Henry Maine, who was a strong advocate of the continental system of a public transfer of land, a written and registered instrument in certain cases of sales, mortgages, leases exchanges and gifts of immovealable property. Thirdly at the suggestion of one of

the Hindú critics of the Bill, they inserted a chapter on gifts.

The Report of the Indian Law Commissioners, 1879, was duly communicated to the Select Committee, which then consisted of Mr. Pitt Kennedy (a very eminent master both of English and Hindú law), Mr. Colvin, Mahárájá Jotíndra Mohan Tagore and himself, and they carefully considered it, as well as the mass of comments on the Bill which had come from all parts of India. As to sales, they agreed with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer; and they were inclined to go a little further in this direction than seemed good to the Law Commissioners. Thus, they thought that, in the case of a reversion or other intangible thing, though its value might be less than Rs. 100, the transfer should be made only by registered assurance: they had altered section 54 accordingly, and the Government of India, in its executive capacity, approved of this alteration.

As to mortgages, the Committee agreed with the Law Commissioners that the requirement of registration would not only discourage fraud and facilitate investigations of title, but that it would also preclude some difficult questions of priority. A majority of them, however, thought that, when the principal-money secured was less than Rs. 100, the mortgage-deed need not be registered, and they altered the Bill accordingly. A majority of them also thought that equitable mortgages by deposit of title-deeds should be valid when made in the Presidency-towns, Rangoon and Karáchí. To this the Government of India in its executive capacity had also agreed.

As to leases, they all thought that the chapter would be of practical use in the case of leases of buildings, gardens and mines, and they agreed with the Law Commissioners that it should not of itself apply to agricultural leases, in other words, to the relations between zamindár, and raiyat.

As to gifts, they agreed with the Law Commissioners that registration should be required in the case of gifts of immoveable property of whatever value. Such gifts were, as a rule, made by a written instrument, and as, under the Registration Act, the registration of such instruments was compulsory, the change of the existing law here proposed was almost nominal.

The Council would see that both the Government of India and the Select Committee approved of the proposed requirements of writing and registration in the case of most transactions relating to immoveable property. It was right to say that this approval was to a large extent due to the arguments of the present Chief Justice of Bengal, and, as the matter would probably be much discussed to-day, MR. STOKES thought it right to read a few extracts from his Lordship's minute. Referring to a letter from the present Chief Commissioner of British Burma, Sir Richard Garth observed :—

"It is stated in paragraph 5 of that letter that 'as an abstract question there appears to be a general concurrence of opinion, *that it is highly desirable that there should be a complete contemporaneous record of all transactions relating to land*, and that the system of transferring immoveable property should be made, as it is on the Continent of Europe, by a publicly-recorded transfer.'

"I rejoice to find that there is a general concurrence of opinion upon this most important question. But then Mr. Bernard goes on to say in the same paragraph :—

"'To what extent this could be carried out in practice is open to some doubt. It could not be done completely, *without requiring a written record of every such transaction, and barring parol transactions relating to immoveable properties;* in other words without the introduction of some kind of a Statute of Frauds, *for which the country is certainly not yet prepared.*'

"Now, here is a proposition for which, as it comes from so high an authority, I presume there must be some good foundation, though at present I have been unable to discover it.

"If there is such a general concurrence of opinion that a contemporaneous record of all transactions relating to land is desirable, why

is it that this country should not be prepared to accept that which would assuredly prove to it a very great blessing?

"I suppose it is almost undeniable that to compel such transactions to be reduced to writing, and to have them publicly registered, is about the most effectual means that any Government can provide of preventing fraud in such matters.

"I suppose it is also undeniable that there is as much fraud and forgery and perjury committed in this country, with reference to such transactions, as there is in any country in the world.

"It is really almost impossible for any one who is inexperienced in the proceedings of Courts of Justice in India to imagine the amount of wickedness of that particular kind which is habitually practised there.

"It is literally true that there is hardly any case of importance relating to land in which one or other of the parties does not himself attempt, or charge his opponent with attempting, some fraud or perjury; and it is almost a common form in most suits for each of the parties to allege that some at least of the documents which are filed by his adversary are forgeries.

"The utter disregard of truth and moral sense which this practice involves is most deplorable. There seems to be little or no feeling of shame or disgrace, even amongst men of good position and fortune, when they are charged with, or even found by the Courts to have committed, such offences. A wealthy zamindar who is accused by his opponent of forging a deed or a rent-roll, or of having been privy to such forgery, never troubles himself, as a rule, to go into the witness-box to deny the charge; nor does he seem to think the worse of himself, nor do his family and friends seem to think the worse of him, when the Civil Court finds him guilty of it.

"So much has this system become habitual, that sometimes, when a suitor has a perfectly honest case and sufficient reliable evidence to support it, he will nevertheless resort, or allow his friends and advisers to resort, to some forgery or perjury in order to improve, as he imagins, his position; and many a man has run a great risk of losing a righteous case in that way.

"Now, this is nothing short of a monstrous national evil. It is frequently subversive of justice. It gives rise to the grossest immorality. The Courts may check it in some degree by prosecutions for perjury and the like, but the system is so deeply rooted,

of all classes think so lightly of its iniquity, that it is often difficult to obtain convictions in such cases, and it is to the legislature only, that the nation must look to repress the mischief in any material degree.

"And the legislature have the means, if they would only exercise it, of greatly decreasing the mischief. They have the same means which has been successfully resorted to for the same purpose in England and other European countries, where the evil is much less formidable and the necessity for remedying much less pressing.

"That means consists simply *in requiring all contracts and transactions relating to land to be in writing, and registered.*

"So for as registration is concerned, this has already been enforced with regard to all written transactions exceeding Rs. 100 in value, and, if the recommendations of the Registration Committee are carried out, the obligation will extend to all written transactions.

"It would then only remain to require all contracts and transactions relating to land to be reduced into writing; but for this, we are told, '*the country is not prepared.*'"

Sir R. Garth then enquired, first, what proportion of transactions relating to land were at the present time not reduced into writing, and, secondly, what proportion of those which were now effected by parol were honest, *bonâ fide* transactions. He proceeds:—

"Now," he says, "as regards the first of these questions, I have been at some pains to obtain a correct answer to it from gentlemen of experience in all the districts of Bengal. I have consulted judges, vakils, zamindars and others whom I considered most likely to give and to procure for me the most reliable information, and the result is very much what I had expected.

"My question, be it remembered, has reference to contracts, arrangements and conveyances relating to land of all descriptions, sales, gifts (other than testamentary), mortgages, partitions, exchanges, transfers, trust-deeds, family and other arrangements and leases of all kinds, always excepting leases made to cultivating raiyats. And I learn from the best authority that a very small proportion indeed of such instruments are now effected by parol, and that this small proportion is yearly and rapidly becoming smaller. Men of all ranks and classes are realising more and more the wholesome and undoubted truth that

oral arrangements, especially in a country like this, are utterly unsafe and unreliable; and that, if it is worth a man's while to acquire property and give money for it, it is also worth his while to secure it by an instrument in writing, properly authenticated and registered.

" Moreover, from the answers which I have received to the first of the above questions, I have gathered a great deal of valuable information from reliable sources, which virtually answers the second question, namely, what proportion of these transactions which are now effected by parol are honest and *bonâ fide ?*

" The answer is,—comparatively few. The arrangements which, speaking generally, are now effected by parol are partitions of small family-properties, gifts and exchanges of small pieces of land between members of the same family, small grants of land to members of a family or the village priest, and the like; but a very large proportion of these so-called parol arrangements are made for the purpose of defeating creditors, or with some other fraudulent object; they are generally brought forward in Courts of justice to defeat the title of some *bonâ fide* purchaser for value: and in the large majority of cases they are disbelieved by the Courts and found to be fraudulent.

" The fact is, that, so long as the law allows facilities to people to defeat *bonâ fide* purchasers, the dishonest and ignorant try to take advantage of them; and it is, of course, a much easier thing, and involves less risk, to set up fraudulent transactions by word of mouth than by a written instrument, more especially as, in all transactions above Rs. 100 in value, the written instrument is useless unless it is registered.

" And the present law, too, works injustice in this way. So many of these oral transactions which are set up in Courts of justice are found to be fraudulent, that judges are sometimes induced to mistrust, and often to reject as fraudulent, the few that are genuine."

The Chief Justice then concluded with the following weighty opinion :—

" On the whole, I would strongly advise the Government to consider the expediency of making that which now is undoubtedly the general rule, the law of the land. I am satisfied that it would be the means of preventing a vast amount of fraud and litigation, that it would be a great blessing to the whole community, and especially so to those who want security and protection most, namely, the poorer, and more ignorant classes."

The bill was then republished in the *Gazette of India*, with the Committee's third report. It was also publishd in the local Gazettes in English and (except in Burma) also in the vernacular languages. It had been before the public, in what was substantially its present form, since the 12th March, 1881. Since then the Committee had received no criticisms of importance, and the Bill seemed now to be approved by all the Local Governments, except those of the Panjáb, British Burma and Bombay.

The Bill, as now settled, seemed to the Select Committee a systematic and useful arrangement of the existing law. But they agreed with the Law Commissioners that, when the body of substantive civil law enacted for India was recast in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the legislature, the chapters on Sale, Mortgage, Lease and Exchange, contained in the present Bill, would probably be placed in close connection with the rules contained in the Contract Act. Till then they might fitly be left in a law containing what the Contract Act did not contain, namely, general rules regulating the transmission of property between living persons.

Mr. Stokes trusted, then, that the Council would to-day permit the Bill to become law. No Bill in the course of his eighteen year's experience of this Council had ever been so carefully considered. It had been thrice circulated to the Local Governments for opinion and publication. It had been criticised by over a hundred of the ablest and most experienced officers in the country, of whom nineteen were, he was happy to say, Natives. It had been five times reported on by Select Committees. It had been carefully revised by the late Indian Law Commission. The Committee thought, therefore, of this Bill, as of the Bill dealing with negotiable instruments, that it was not now likely to be improved without the experience to be gained from its actual working.

The Hon'ble DURGA CHARAN LAHA said he had only a few remarks to make in regard to the Bill. The alterations which had been recommended by the Select Committee in their last report, to the effect that nothing in the second chapter of the Bill should be deemed to affect any rule of Hindu, Muhammadan or Buddhist law in respect of the transfer of property, was, in his opinion, a decided improvement, and removed the objection which was justly taken by the Hindû community. It showed that the legislature had no intention to interfere with the personal law of the Natives regarding the transfer of property. He thanked the hon'ble and learned member and the Select Committee for the consideration they had shown in this matter, and it afforded him much pleasure to give his support to their recommendation.

The Hon'ble SAYYAD AHMAD said : "My Lord, I wish, with your Excellency's permission, to say a few words before the discussion on this Bill closes. The Bill is one of the most important ever introduced in this Council, and I congratulate my hon'ble colleague, Mr. Stokes, for having brought it to the stage which it has now reached. I have carefully read the Bill with the special object of discovering whether any rule contained in it is such as would disturb the customs and usages of the people of India, and especially the Mussulmán community. And I have no hesitation in saying that none of its provisions is calculated to affect any portion of the Muhammadan law. Nor, indeed, so far as my knowledge of Hindú law extends, can I see anything in the Bill which can interfere with the customs and usages of my Hindú fellow-countrymen. The wise rule, always kept in view by the Indian legislature, of saving the personal laws of the people of India, has been duly observed in this instance, and I believe not a voice can be raised against the Bill by the people of India on the ground of its interfering with their personal laws.

"But, my Lord, it is not only on this ground that I am

anxious to give my humble support to the Bill. Independently of any considerations of expediency with reference to the sentiments of the people of India, I look upon this piece of legislation as a great step in the direction of that great object which, I trust, will before many years pass away, be fully achieved. I refer to the formation of a code of substantive civil law as complete and precise as our Penal Code. The law which is to govern the transfer of property *inter vivos* must necessarily form an important chapter of the Civil Code in contemplation.

"My Lord, if anything I can say can be regarded as representing the feelings and opinions of my countrymen, I will take it upon myself to say that this Bill will be welcomed by the Native public when it becomes law. It will be welcomed by those who possess property, by those who are under the necessity of transferring it, by those who wish to acquire property or to advance money on landed security. It will be welcomed alike by the suitors who quarrel, and by the Judges who have to decide those disputes. And, in saying this, I am expressing the convictions that have grown in me during an experience of half a century, as a citizen of the British Empire in India, as one who has had the honour of serving Government as a judicial officer for no less than thirty-five years, as one who has frequently been consulted in private life by intimate friends in regard to their personal transactions, such as will be governed by the provisions of this Bill when it becomes law. My Lord, I make these observations personal to myself, for I believe that the best way in which I can support this Bill is to base my conclusions in favour of its becoming law, not on theories, but on facts not on speculation, but on my actual personal experience of the past. And, my Lord, since this Bill is the most important outcome of the policy which brought about the establishment of the Law Commission of 1879—since this Bill is a decided and significant step towards the codification of our substantive civil

law, I trust your Lordship will permit me to say, in as few words as possible, what I consider the state of the real Native feeling to be in regard to the important question of codification, I am mournfully aware that codification has its opponents, some of them gentlemen holding high rank in the Administration, and entrusted with large responsibilities, and to whose opinion weight should, no doubt, be always attached. But I can not be far wrong in saying that almost all the opposition comes from those who are least likely to become subject to the uncertainty and risk to rights and property which the absence of codified law involves. So far as I am aware, the Native public has never raised its voice against codification. To them, codified laws mean the introduction of certainty where there is uncertainty —precision, where there is vagueness. Now can it be said that codification is unpopular even among the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not, even at this time of life, in a position to say confidently, that of all the innumerable blessings of the British rule, the one my countrymen esteem most is justice ; that justice, in their eyes, means peace and order, which, in other words, mean security to life and property —the sole aim and end of Government. At present, whilst a splendid Penal Code and a Criminal Procedure regulate criminal matters, the civil law is administered on the somewhat vague, though noble, principle of ' justice, equity, and good conscience,'—a principle much of whose beauty is practically spoilt by the fact that individual judges in similar cases do not take the same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification, and codification alone, can remedy the evils which arise from uncertainty of the law ; codification alone can enable the public to know

their exact rights and obligations; codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India; codification alone will enable the deliberate will of the legislature to prevail over the opinions of individual judges; and litigants will then be more anxious, before going into Court, to consult the Statute-book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision. To say that the Native mind is unfamiliar with the idea of living under systematically codified law, is to say what the truths of history do not justify. The Institutes of Manu furnish a noble example of ancient codification, and the law-abiding tendencies of the Hindú mind have made them adhere to its behests to this day. The history of the Muhammadans furnishes a long series of attempts to codify their laws. In the earliest days of the Caliphs of Bagdàd, books were compiled under the authority of the Caliphs, to supply the requirements of a code. These books from their very names indicate that they were meant to be codes. The attempts at codification continued down to the time of the Mughal Emperor, Aurangzeb, and, in the *Fatawa-i-Alamgiri*, we find, perhaps, the most magnificent and most durable monument of that remarkable monarch's reign. The conditions of life in India have since undergone a great change, and, whilst the personal laws of Hindús and Muhammadans are secured to them, the British rule has asserted its right to regulate purely temporal matters so as to suit the more advanced requirements of the present age. The people of India have gladly and loyally accepted this fact, and there can be no justification for saying that the mind of the Native public is unprepared for codification, or that attempts on the part of the Government to supply them with a systematic code will be regarded with feelings other than those of satisfaction.

"My Lord, I should not have digressed into these somewhat general observations had I not felt that much misapprehension prevails in regard to the attitude of my countrymen towards codification, and also that I could find no better opportunity for giving such support as lies in my power to the policy of codification,—a policy of which the Bill now before us is an illustration of considerable importance.

"My Lord, the Bill, as it now stands, is in my opinion fit to pass into law without any further amendment. Delay in passing it would only postpone those advantages which, I feel sure, will accrue from it to the public. Enough thought and consideration have been bestowed on it, and the outside public have had ample time to know its provisions.

"My Lord, I shall therefore vote in favour of the Motion that the Bill, as it now stands be passed into law without any further delay."

The Hon'ble RAJA SIVA PRASAD said he had had some objections to the Bill, but as the Select Committee had been good enough to accept his amendments, he had now simply to explain the objections he had taken. He did not object because he thought that the Bill touched upon the Hindú law as interpreted by the Judicial Committee of Her Majesty's Privy Council and the English Judges of the Indian Courts, but because it affirmed those decisions on certain points regarding the right of a Hindú to dispose of his property by creating perpetuities or bequests in favour of unborn persons. The Hindú community did not acquiesce in those decisions, and they did not wish to see them affirmed by the legislature until they had had an opportunity of contesting the points fairly, and, if necessary, of proposing a legislative enactment on the subject. Of all the perpetuities, the worst was that of mistakes, and he hoped that these vexed points might be satisfactorily settled during His Excellency's brilliant rule.

The Hon'ble MR. CROSTHWAITE said that, in the position

which he held as Judicial Commissioner of the Central Provinces the presiding Judge of a non-chartered High Court, and in the face of the opposition undoubtedly existing in certain quarters, he felt bound, in spite of his reluctance to occupy the valuable time of the Council, to give reasons for the vote he was about to record.

The opposition was of two kinds. There was an opposition to the principle of codification, denying the possibility, and doubting the utility, of formulating the civil law. And there was a more definite opposition directed against this particular measure.

It might be enough to say that the principle of codification had been, as he believed it had been, definitely accepted by the Government, both here and in England, and that no choice was left to the Council in the matter.

He would however, go beyond this argument, and would endeavour to answer some of the objections that had been made. The obstacles in the way of codifying the law in India were no doubt, great, and were probably best appreciated by those who had had to frame and carry through this and similar measures. They arose, however, not so much from any inherent difficulty in making a law which should contain rules both for simple and for complicated cases, but from the numerous conflicting interests to be cared for, and the widely varying conditions of the different races for whom the Council had to legislate. The compromises necessary to reconcile such interests had naturally left their mark upon the Bill, which was thus laid open to the charge of being incomprehensive and incomplete.

As an example of the difficulties that had had to be met, he would give to the Council the history of section 69. It was the custom among English people, when money was lent on the mortgage of land to incert in the mortgage-deed a power of sale, authorizing the mortgagee, subject to certatin conditions,

to sell, without the intervention of a Court, the mortgaged property if the money was not paid when it became due.

But it had always been held by the most experienced Indian authorities that a power of this kind would work mischievously in rural India. Hence, in the first drafts of the Bill, such powers were declared to be invalid.

The Indian Law Commissioners, however, for reasons given on page 35 of their report, altered the drafts and declared the power to be valid in all cases in which the mortgaged property should be five hundred rupees or upwards.

Representing, as MR. CROSTHWAITE thought he was bound to do, the interests of the ignorant landowners of Upper and Central India, who borrowed money without the aid of legal advice, and dealt with men far above them, as a rule, in intelligence and astuteness, he felt himself compelled to dissent from the opinion of the Law Commissioners, and the section was altered so as to enable the Local Governments to declare the areas within which this power of sale should be valid. It appeared, however, that this alteration was not in accordance with the views of the gentlemen whose interests his hon'ble friend Mr. Inglis so ably represented—interests which must be respected by all who had the true prosperity of the country at heart. A fresh consideration of the matter became necessary, and the result the Committee arrived at was embodied in the present section 69 of the Bill, and which, if it satisfied Mr. Inglis and his friends, as he believed it did, was also quite sufficient to guard the interests of those whom he had in view.

MR. CROSTHWAITE mentioned this to show what difficulties had had to be met, and how impossible it was that a code of this nature, which was not always understood by those who were affected, or thought they were affected, by it, could be otherwise at first than imperfect, incomprehensive and, to the stiff legal sense, disfigured by compromises and exemptions.

Much had been heard, in relation to the Bill, of the difficulty that would arise to the people if it was passed. The two hundred and fifty millions of India were cast in the teeth of the Council, and the unfortunate peasant was represented as driven to distraction by the complicated provisions of the law.

Now, as to any difficulty of this nature which arose or was likely to arise from this Bill, it was, he believed, very much exaggerated. Codes of the kind were like arithmetic books, with the exception that people were not obliged to learn them. A man whose whole transactions consisted of a few simple acts of barter had no occasion to trouble himself about the rule of three or compound fractions. And, in like manner, it was only those whose transfers were subject to conditions and interests, multifarious and complicated, who would be affected by the more complex and intricate provisions of the Bill,

The necessity of codification arose from the present state of the law, combined with the nature of the Courts. It was the fashion to speak as if the present Bill would supersede a code of clear case or statute-law. Whatever might be the case within the jurisdiction of the Calcutta High Court, there was certainly in the parts of India with which he was acquainted, no clear body of law on the subjects dealt with in the Bill. To use the words of one of the officers, Mr. Quinton, who had recorded an opinion on the Bill—"Our Courts have to grope through the wilderness of precedents on the subject of sales and mortgages."

The progress of a difficult case was somewhat in this wise. The Court of original jurisdiction had not much legal training or learning, and, as the Government did not provide it with text-books or commentaries, or even Law Reports, its law-library was usually confined to copies of the Acts and Regulations. It was puzzled by the precedents produced by the contending parties, who, being at liberty to pick and choose among the decisions of four High Courts, had no difficulty in showing authorities for every view of the point in issue. If there was no

ruling on the matter by the Court to which the Judge was subordinate, he eagerly grasped the precedent which seemed most to the purpose. On appeal, the Lower Appellate Court, which was more experienced and better informed, and received copies of the Indian Law Reports, was often compelled to differ from the Judge below. The result was a second appeal, in which the High Court, having more information, a better library and more leisure to go thoroughly into the authorities on the point, was often obliged to take a different view from either of the Courts below.

And no one could say what the decision of the Judicial Commissioner would be, unless that Judge had had a similar case before him, or unless the matter had been decided by the Privy Council ; for he also might pick and choose between the rulings of four chartered High Courts and was bound by none. He was often like a man standing at a place where four roads met and where there was no sign-post. It might end by his following none of the made roads, but taking a straight line of his own across country. Whatever might be the result of the present state of things, it was not certainty.

How far this was a true description for Bengal and for the Courts under the Calcutta High Court, MR. CROSTHWAITE left his hon'ble friend Mr. Evans to say.

Now, he did not venture to hope that the present Bill would remove all uncertainty ; and, for a time, until the meaning of each section had been thoroughly understood by the first Courts, it would probably increase litigation. But, speaking as a non-professional Judge, and even admitting, what he did not admit, that all the charges of imperfection brought against the measure were sound and true, still he said that the Bill was a step in the right direction, and he thought that he had with him the great body of the non-professional Judges, whose opinion was in this matter to his mind the best guide. For it was not to an athlete that a person would go for

advice as to the best description of crutch. He could well understand the feelings of a thoroughly able and learned lawyer with regard to a Bill of this kind. It dealt with matters as familiar to him as his alphabet, and it dealt with them in a way that did not quite suit his sense of taste as a legal artist. He thought that he could have done it better himself, and he felt that the cut-and-dry sections of the law would tie his hands and prevent him from doing that perfect justice at which it was the pride of all the Judges to aim. Mr. Crosthwaite could well understand this. But, at the same time, he was sure that for the non-professional Judge, who must, for obvious reasons, preside in the Courts for some time to come, anything was better than the present chaos, in which imperfect knowledge had to struggle with the conflict of authorities.

He would briefly notice some of the more definite objections taken to the present Bill.

It was questioned, he believed, by some whether it correctly represented existing law. This was a point on which his opinion would not be taken. But perhaps his hon'ble and learned friend Mr. Evans would state his opinion on the matter. He might quote from the notes of many of the officers who had criticised the Bill. He contented himself with citing the opinion of the Hon'ble Mr. Justice Field, because he believed no man was better acquainted than he was with the statute and case-law of India. He said :—

"I have again carefully examined the Bill as alterd and revised and, speaking generally, I think it has now been brought into harmony with the law of India, and will, in all probability, prove a useful measure."

It had been urged—urged indeed in a very forcible manner by the Panjáb authorities, who had exempted themselves from the operation of the law—that the Bill would interfere with and override many of the old customs so dear to the people. He had searched the papers in vain for any specific instance of

a custom so overridden, and he ventured to say that such customs must be few indeed. He was speaking of the Bill apart from its saving clauses. There were many customs of inheritance, marriage, adoption and other social matters. But customs, properly so called, regarding sale or mortgage or gift, there were, he believed, none or very few.

MR. CROSTHWAITE could not help thinking that much of the outcry about custom arises from a lax and unscientific use of the word. A legal custom,—his hon'ble friend the Law Member would set him right if he was in error,—a custom, that was, which the law would recognise and the Courts act upon, must be immemorial, invariable, reasonable and established beyond doubt. Now it could be hardly doubted that this was not the sort of custom which some of the opponents of the Bill contemplated. For example, he quoted from a letter by the Secretary of the Panjáb Government, which was printed on page 221, Vol. I, of Mr. Tupper's *Punjáb Customary Law* :—

"His Honour had always held that directly any attempt is made to legalise a custom its virtue as a custom is lost. The reason why the legislature provides for the observance of customs in judicial decisions is because such observance provides for the fluctuation of public sentiment and for the development of national ideas, and enables the Courts to take into consideration both the one and the other in adjudicating on questions of social interest. As soon as the impress of the legislature is stamped upon such customs, they become to all intents and purposes unalterable records of a state of things which may continue and may change while a change in the body of substantive law thus formed is very difficult to effect without the pressure of an influence which a social revolution only could exercise."

NOW, MR. CROSTHWAITE ventured to say, with all deference to the gentleman who wrote that letter, that the object of the legislature was not what he described. A custom fluctuating with public sentiment was a contradiction in terms. To administer civil law on the basis of changing sentiments and

imperfectly known usages of the people would lead to a confused labyrinth of decision in which no right would be secure, and in which the unfortunate Judges, and more unfortunate suitors, must wander like the blind led by the blind.

It must be remembered that, when a Court had once decided that a custom existed, the custom was as binding and rigid in its operation as a legal enactment; nay, more so, for the legislature, especially in India, would always be more reluctant to repeal a custom than to amend one of its own laws. But, leaving this question aside, the Bill had been so framed as to save every custom or usage that could have any title to legal recognition. Mr. Tupper, than whom there could be no better authority, admitted this, although he opposed the extension of the Act to the Panjáb. On page 35, Vol. I, of *Panjáb Customary Law*, Mr. Tupper said :—

"The transfer of Property Bill saves the provisions of any enactment not thereby expressly repealed. Sections 5 and 7 of the Panjáb Laws Act are therefore unaffected; also section 16 of the Panjáb Land-revenue Act. Accordingly, the whole of our customary law, and the existing system for enforcing it, so far as that measure is concerned remain intact."

The same applied, *mutatis mutandis*, to the Central Provinces, where there was in force an enactment similar to the Panjáb Laws Act.

It was impossible, therefore, that any custom properly so called should be overridden by the Bill.

Coming now to the personal law of the Hindús, Muhammadans and Buddhists, Mr. Crosthwaite believed it also was perfectly safe under the Bill.

Scrupulous care had been taken not to touch the personal law of any race. Mr. Crosthwaite, for one, would be reluctant in the extreme to do anything that would trench on the province of Hindú law—a law for which he entertained a great respect, and which was in many ways eminently suited to

the genius of the people who lived under it. The only sections which were intentionally drawn otherwise than in accordance with that law were those sections which required certain descriptions of transfers to be made by written instruments. And, in order to prevent any possible hardship to the more backward tribes from this provision, power had been given to the Local Governments to exempt the members of any race, sect, tribe or class from all or any of those provisions—a power which would, he hoped, be exercised carefully.

So far as he could discover from the papers, none of the Hindû lawyers who had criticised the Bill accused it of touching their law. The only specific charges brought against the Bill in that respect were contained in a paper forwarded to the Select Committee on the 9th instant by the Hon'ble Mr. Justice Cunningham. Anything coming from a Judge of Mr. Cunningham's eminent learning and ability must have great weight. MR. CROSTHWAITE confessed, when he first read Mr. Cunningham's note, in which he represented the Bill as making piecemeal alterations in Hindú law, he was startled. But, after the best examination of the subject which he could give to it, he came to the conclusion that the matters referred to by Mr. Cunningham were unimportant. He objected to some words in section 6, which the Committee had already omitted for other reasons, but which he believed, in their intention at any rate, were not contrary to Hindú law, and came, if he was not mistaken, from the hand of a very eminent lawyer well acquainted with Hindú law, Mr. Pitt Kennedy. Mr. Cunningham took exception to the wording of an illustration as inaccurate. That the Committee had corrected. Ahother section to which he objected, and which dealt with the rights of a *bonâ fide* purchaser of property subject to a charge for maintenance, was undoubtedly in accordance with existing law. The second clause of section 44, which dealt with the rights of a transferee of a share of a joint family dwelling-house, might

be new, that was, there were no rulings to support it. But it was reasonable and in accordance with Hindú sentiment, and was, he believed, suggested by his hon'ble friend the Mahárájá Jotíndra Mohan Tagore.

Mr. Crosthwaite confessed that the examination of the Hon'ble Mr. Cunningham's paper satisfied him that the Bill had not trespassed on the sacred ground of Hindú law.

But another class of objectors arose at the last moment, represented by his hon'ble friend Rájá Siva Prasád, for whose opinion as a learned Hindú he had great respect. This gentleman and his friends objected to the Bill, not because it infringed Hindú law, but because it did not infringe it. They wished the legislature to go behind the decisions of the Judicial Committee of the Privy Council and of the Indian Courts, and to adopt the interpretation of Hindú law which some Pandits of Benaras thought to be right. The question which they would raise was a very large one—whether Hindús had the power of creating perpetuities or not. The Privy Council (Judicial Committee) had decided that they had no such power, and the Bill in section 14 was framed accordingly.

It was impossible, if the question was to be dealt with in the Bill at all, to do otherwise than follow the rulings of the highest Appellate Court. But there appeared to be so strong a desire on the part of the Hindús, so far as the Committee could judge, that these rulings should not be affirmed by the legislature until the Hindús interested in them had been able to contest the point further, that they thought it best to save Hindú, Muhammadan and Buddhist law from the operation of Chapter II.

This, to a certain extent, weakened the Bill, and it was a kind of legislation which to him personally, and no doubt to others of those who had consented to it, seemed feeble and unsatisfactory. But it was clearly inexpedient to deal with a

very large question of this kind, the decision of which could hardly be said to have been part of the direct object of the Bill, otherwise than with the greatest caution and deliberation. There was, therefore, no course open to the Committee but to delay the Bill and put it off *sine die*, or to exempt the personal laws of Hindús from the operation of Chapter II.

Mr. Crosthwaite objected strongly to delay, as he thought that no advantage could possibly arise from it. The only chance of getting a more perfect law was by the experience gained in working this. A Bill of this kind lost its continuity by passing through a multitude of hands, and ran the danger of becoming a piece of patchwork. The second course had, therefore, been followed, and his hon'ble friend Rájá Siva Prasàd was now free to use his efforts to procure for the Hindús a power little consonant with the present state of things,—a task in which, considering the rapid progress now being made by his countrymen, he could hardly succeed.

As to the technicality of the Bill, of which much had been said, a law of this kind must be technical. Mr. Crosthwaite could not understand how a law on such a subject could be written within reasonable compass without using technical terms. It was perfectly intelligible to any one who understood English and had the requisite elementary knowledge of the subjects dealt with. The best proof of this was the mass of criticisms elicited from non-professional Judges—criticisms which showed beyond doubt that they understood the Bill. And, if the Judges could not understand a Bill like this, what hope would there be of their understanding cases that would come under the law? There was, however, one thing he would like to urge on the attention of the Legislative Department. The Local Governments should be asked to take more than ordinary care in the translation of these codes. No one but a lawyer who was also a scholar could translate them accurately.

But there was no difficulty in finding competent men, whether Natives of India or Englishmen, to do the work. It might perhaps be necessary to pay them somewhat more than was given to the ordinary translator. But the cost would be comparatively a mere trifle, and, as the Bills had already been translated, and only needed revision, it was a work that could not require more than a week or two to complete.

The Hon'ble MR. EVANS said he felt bound to detain the Council for a short time with a few remarks which he had to make on the subject of this Bill. But he hoped His Excellency the President would pardon him if he asked for information on a point of procedure. He wished to know whether any vote was intended to be taken on the present discussion, or whether it would be taken on the amendment which appeared in the notice-paper.

His Excellency THE PRESIDENT observed that that must depend upon circumstances. The Council would be entitled to vote on the present question, and again, subsequently, on the motion of the Hon'ble Mr. Plowden. At the present moment, no opposition had been expressed to the motion before the Council, and, consequently, so far as the discussion had gone, HIS EXCELLENCY supposed that no vote would be taken upon it. But if his hon'ble friend had any general observations to make, this appeared to be the proper stage for him to make them. Mr. Plowden's motion was a definite motion for postponement, and strictly speaking, the discussion ought to be confined to that particular question.

The Hon'ble MR. EVANS continued.—He trusted the Council would not deem it a waste of time, if he briefly reviewed the circumstances which led to the introduction of this important measure. Even in England there was a steadly growing feeling in favour of codification. But there the law, though contained in that "wilderness of single instances"—

the Reports—was the slow and gradual growth and development of centuries; and there the judges were all professional lawyers of eminence, familiar from long and daily practice with the principles of law and the method of applying them, and able, by lifelong study, to find their way unhesitatingly through labyrinth of Law Reports, and they had the assistance of an able and highly trained Bar. Here matters were very different. The Hindú law relating to inheritance and some other matters remained in full vigour partly because it was intimately bound up with religion. But the greater portion of the ancient civil law of the Hindús relating to contracts—the traffic of man with man in the ordinary relations of life—had become obsolete and sunk into oblivion.

When the English began to rule this country, they found that, after securing to the people such laws as they found in living existence, there was a great void to be filled, and this they did by the simple injunction to the judges in the Mufassal to decide all cases not otherwise provided for according to equity and good conscience. Where were the judges to look for the rules of equity? They could find little or no guidance among the collection of archaic rules and customs which stood out amidst the debris of the ancient Indian systems, and naturally fell back on the rich store-house of English law. That law, elaborated by eminent jurists in the course of centuries, with the aid of the invaluable legacy left us by the Roman Empire, was naturally resorted to by all who were in search of principles.

The whole history of our judge-made law for the last century was an illustration of the process.

Sometimes broad and general principles of universal application were laid down; sometimes narrow and technical rules peculiar to England were introduced and subsequently exploded; and still the course of formation, destruction and alteration went on till the records of it reached the unwieldy proportions of the present mass of Law Reports.

Then it was felt that something ought to be done.

Very few of the judicial officers in India were trained professional lawyers. Most of the Courts of first instance had no libraries of any sort, no text-books, no means of reference, and yet their judgments were all liable to come before higher and better-instructed tribunals, and ultimately before the High Court, where those judgments were set aside because they ran counter to rules contained in cases which the authors of those judgments had no knowledge of and no means of knowledge.

The perplexities of judicial officers in this state of things had been well described by his hon'ble friend Mr. Crosthwaite, and the sentiments of the suitors as to the uncertainty of the law could not be better represented than they had been by the Hon'ble Sayyad Ahmad Khán with his long and varied experience.

The law relating to the transfer of property was the subject now before the Council.

It was long ago decided by the Home and Indian Governments that the codification of this branch of law was desirable. The importance of it was manifest. Nothing could be more important than security of titles and the avoidance of uncertainty and confusion in dealing with property. That uncertainty and confusion in matters connected with property depreciated the value of property was undeniable and self-evident.

No better proof of the necessity of taking some steps to remedy the existing state of things as to titles and mortgages in India could be given than the well-known fact that the wealthy and powerful Land Mortgage Bank (Crédit Foncier Indien) had, after some years' experience, to give up lending money on land in India, because the titles and the law and procedure as to mortgages were in so unsatisfactory a state that the high interest obtained did not cover the risk.

Taking up the present Bill, the Council would find it divided into chapters.

Chapter I called for no special remark on this occasion, except that Bombay had been exempted for the present from the operation of the Bill. This exemption was made in consequence of the Bombay Government applying at a very late period to be exempted. It had been granted by the Executive in accordance with instructions from the Secretary of State not to introduce the Bill at once into the territory of any Local Government which objected to it. But MR. EVANS saw no materials before the Council which would lead him to doubt the suitability of the Bill to the civilised portions of the Bombay Presidency.

In Chapter II, several rules were introduced from the Succession Act, 1865, defining the limits within which property could be tied up by settlment *inter vivos*, and laying down the rule restricting perpetuities. He had always been apprehensive that these rules would unduly extend the powers now possessed by Hindús (under the rule in the *Tagore case*) of tying up the properties after their deaths. The rule in the *Tagore case*, which prohibited gifts or bequests to unborn persons, was now the Hindú law as declared by the highest tribunal, except so far as the rules now proposed to be embodied in the Act had been made applicable to the wills of Hindús in Bengal by the Hindú Wills Act, 1870.

The Hindu Wills Act was passed before the Privy Council had finally laid down the doctrine that no interest could by Hindú law be created in favour of an unborn person, which doctrine, as they pointed out, oviated the necessity for any rule against perpetuities under Hindú law, and also explained why no such rule could be found in the Hindú law. How far the Hindú Wills Act did in fact abrogate, in the case of Wills in Bengal, the rule in the *Tagore case* was a disputed point now in course of settlement by the Courts. It appeared to him that the question, whether extended powers of tying up property should be granted by legislation to Hindús, was one of grave public policy not to be lightly settled.

Mr Evans' difficulties on this point had been removed in a singular manner. The Hon'ble Máhárájá Jotíndra Mohan Tagore and the Hon'ble Rájá Siva Prasád, conceiving, in common with many of their fellow-countrymen, that the rule in the *Tagore case* did not correctly represent the Hindú law, and that Hindús were by their own law empowered to tie up their property for ever without any restriction, had rejected the extensive powers conferred upon them by the Bill as too limited, and had asked that a clause should be added to Chapter II, providing that nothing contained in that chapter should affect any rule of Hindú law. As the effect of this was to leave this important question as it stood for the present, and to give an opportunity for its full consideration in future, he had gladly acceded to the proposed amendment, though regarding it from a different point of view from that taken by its proposers. For his part, he would sooner repeal the corresponding sections in the Hindú Wills Act, and stick to the rule in the *Tagore case*, with an exception in favour of bequests to, or settlements on, unborn children of a Hindú daughter to take effect on the death of the daughter.

The difficulties arrising from settlements of land in England should make the Council chary of extending the existing powers of settlement in India.

The Chapter on sales of immoveable property provided for written instruments and ragistration, and laid down rules as to the rights and obligations of buyer and seller.

He had not heard much objection to these latter, but there had been a cry raised against the supposed hardship of requiring writing in the sale of land. Speaking of the civilised parts of Bengal and excluding any wild tribes who might be ignorant of the art of writing (and who would, as a matter of course, be exempted by the Local Government), he could safely say that his experience, and all the enquiry he had been able to make, led him to believe that this objection was purely visionary, as,

in practice, all sales of land of the value of Rs. 100 or upwards were always evidenced by a written document.

On the policy of insisting on writing and registration in order to avoid confusion and uncertainty in titles, Mr. Evans need not dwell.

The chapter on mortgages was the most important in the Act. The law relating to mortgages urgently called for definition and practical amendment.

Mortgages were legislated for in Bengal as early as 1798, but as the old Regulations gave a somewhat combrous and unsatisfactory procedure, and did not cover every class of mortgage, money-lenders had resorted to a simple mortgage-bond, consisting of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree, and sell up the mortgaged property without allowing any time for redmption. The sale being an ordinary execution-sale of the right, title and interest of the debtor, whatever it might be, it was usual, when the same property was pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchasers to fight out in court the question of what they had bought under their respective sales. There being no machinery for bringing together into one suit the various incumbrancers on the property, endless confusion had been the result, and the decisions of the Courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered.

It had been one of the objects of this chapter to remedy these and other similar evils.

Mr. Evans hoped some day, when our registration-system

was improved, to see a much greater change, and to see incumbered land sold under a statutory title, leaving all disputed questions to be fought out over the proceeds in court. But, pending this, it was very necessary to do something, and what was done by this chapter would, he expected, remedy, or at least ameliorate, many of the existing evils.

It had been proposed to legalise powers to the mortgagee in the Mufassal to sell without the intervention of the Court. He was strongly of opinion that these powers, which were practically unknown in the Mufassal of Bengal, could not be safely granted except where the property was situated in the Presidency-towns or the parties were Europeans. There had been some doubt as to the validity of such powers. This chapter dealt with this vexed question, as he thought, satisfactorily. He should have preferred to see equitable mortgages abolished altogether, or at least confined to land situated within a Presidency-town. They produced great confusion in the case of land in the Mufassal, and frustrated the effects of registration.

There was little to be said of the remaining chapters, except that they made very little change in the existing law, and that the small changes made seemed desirable.

It could not be expected that a work of this kind should be free from errors, imperfections and omissions; but it had now been very long before the public, and a great mass of valuable criticism had been received, which had led to many alterations from time to time.

Very probably this Act, like many other Acts, would in time be altered, amended and improved as necessity arose and flaws were discovered in its working. But, after undergoing consideration and criticism for five years, it was not likely to be further materially improved unless it was subjected to the test of being worked.

The Hon'ble MAHARAJA JOTINDRA MOHAN TAGORE said that, having signed the Report of the Select Commitee

without dissent, he deemed it necessary to say a few words before the Bill was passed into law. In his opinion, measure of this kind, to be complete, should as far as practicable, embrace, within the scope of its operation, all sections of the community, and this, he thought, was the original intention when the Bill was first framed; but, unfortunately, as far as some of its provisions affected the Hindús, the Bill simply gave the sanction of law to certain principles which were laid down by the Courts of justice in later days; but these decisions the Hindús contend, were not only based upon erroneous constructions of their law, but were also opposed to the rulings of equally high authorities of an anterior period. Some of these modern decisions imposed upon the Hindús disabilities which, he thought, no other nation in the civilised world laboured under: others, again, were so much in accordance with the theories of English law, that they might be said not to interpret Hindú law as it was, but what, according to the advanced notions of modern jurists, it ought to be, and, naturally enough, they ran counter to the thoughts, feelings and ideas of the Native community. He represented this to the members of the Select Committee, and though they were most anxious to preserve Hindú law in its integrity, they were disposed to accept the later decisions of the Courts as containing the true exposition of that law. On the other hand, the Hindú community held as strongly that these decisions, as he had stated, were based upon a misconception of the true spirit of the law, and in this opinion they were supported, not only by the learned Pandits of all parts of the country, but also by no less an authority than that eminent Sanskrit scholar, Goldstücker, who, as was well known, had declared that many of the translations of the texts of Hindú law were inaccurate; and therefore, he submitted, many of the decisions founded on these incorrect translations were necessarily inaccurate. He and his hon'ble friend Rájá Siva

Prasád had brought these circumstances to the notice of the Select Committee, and took the liberty to point out the extreme hardship and injustice to which that community would be subjected should the legislature seal with its sanction those principles to which such strong objection was taken. To institute, however, proper enquiries and to arrive at correct conclusions must necessarily be the work of a long time. It had, therefore, been agreed, as an alternative course, to exclude the Hindús, Buddhists, &c., from the operation of many of the Provisions of the Bill. The effect of this would be that, when the Bill would be passed into law, it would not interfere with many of those disputed points of Hindú law as it was at present administered, though it must be observed that it would leave those points in a very unsettled and unsatisfactory state, to be dealt with from time to time by particular Judges according to the light that might be in them, with the chance of those recent decisions, which had overridden the rulings of a former period, being upset in their turn by other decisions at a future time, until the legislature stepped in and, after the fullest and most careful enquiry, determined and laid down principles in accordance with the true spirit of Hindú law, and in consonance with the wants, wishes and feelings of the Hindú community whom they most concerned, and adapted as well to the condition of Indian society.

The Motion was put and agreed to.

The Hon'ble Mr. Plowden said that he did not intend to occupy much of the time of the Council, but he was afraid he should have to trespass upon their patience at some length. He would, however, be as brief as he could possibly be, and, for this and other reasons, he was not going to enter into any elaborate criticism of the Bill in its legal aspect. First of all, he had not the legal knowledge which would enable him to give an opinion deserving of the attention of the Council on the subject; in the next place, even if he had the ability, he

had not had the time to go thoroughly into an exhaustive criticism from this point of view; and, lastly, the Council had now before them the opinions of certain experts in the law, by which members of the Council could determine what the value and merits of the Bill might be. He must confess that he was some what surprised to find that, in the voluminous papers which had been circulated in connection with the several Bills which embodied this measure, and the history of which had been given to them by the Hon'ble Member in charge of the Bill, amongst the opinions of these experts there was an extremely valueable opinion, all referrence to which had been omitted; and that was the opinion of Sir FtzJames Stephen. His opinion was that of a competent expert, and he gave his opinion in reply to a special call of the Government of India on this Bill and five other codifying Bills of the Indian Law Commission. MR. PLOWDEN supposed that nobody could deny that great weight and great value should be attached to any opinion given by such an eminent authority, and he should like to know what would be thought of the opinion which he found recorded before him. He would read the opinion of that very eminent jurist, which was given in 1879, in respect of the present Bill. He said:—"I am still, however, by no means satisfied that any part of this Bill is really wanted in India except, perhaps, the chapter on Mortgages and, possibly, the chapter on Leases." He would now request the Council to turn to the Bill No, VII, now before them, and if they looked at it they would find, that, in addition to those two chapters which Sir James Stephen did not disapprove of, there were no less than five other chapters, and of these, four were absolutely identical with four of the chapters contained in the Bill which was submitted to him for consideration, and on which he did not approve. MR. PLOWDEN also saw a note the other day, which he supposed was the same which had been just referred to by the Hon'ble Member in charge of the Bill

and which contained the opinion of the Hon'ble the Chief Justice of the Calcutta High Court; and what did the Chief Justice say? The Council had heard that Sir Richard Garth was in favour of the Bill, and MR. PLOWDEN concluded he was, as the Hon'ble Member in charge of the Bill said so. But he did not gather, from what he saw of that opinion, that the Chief Justice was absolutely in favour of that Bill, Sir Richard Garth said in effect that he could not say he quite approved of the principle of the Bill as it had been framed. It went far too much into details, and would perplex Mufassal Judges in the consideration of many difficult questions. MR. PLOWDEN referred to these opinions simply because he had heard it stated lately that there was no opposition to the passing of this Bill on the evidence of experts, except the single-handed opposition of Mr. Justice Cunningham. He thought, from the extract which he had just read from Sir James Stephen's opinion that he was justified in saying that this was not the case; for here was a very competent man, able to give a valuable opinion, and he was not of opinion that the Bill was absolutely required. MR. PLOWDEN would not enter at any length into the remarks of Mr. Justice Cunningham. He thought that, to some extent, there was great misapprehension in parts of what Mr. Justice Cunningham said. At the same time, he thought that there were other portions of his remarks which required serious consideration before passing this measure, more especially his remarks on section 54 of the Bill. Mr. Cunningham said, in reference to that section.—

"The rule making registration in the case of every transfer of an intangible interest, though below Rs. 100, compulsory, is a serious change in the law, and, however expedient, should not be introduced without the fullest notice to the classes concerned. Every such change is an opportunity of fraud upon the ignorant and careless."

MR. PLOWDEN had listened with great interest to the observations which had fallen from Mr. Crosthwaite, to the effect that this Bill was needed. As he (Mr. Crosthwaite) was

thoroughly acquainted with the state of affairs amongst the agricultural population of the North-Western Provinces and the Central Provinces, he must be aware that these opportunities of fraud had arisen in other cases, and had been attended by singularly unfortunate results. There was a time when agricultural leases were not necessarily registered ; then there came an alteration of the law, and from that time leases from year to year, or a term of years, were obliged to be registered. Notice of this change in the law was not given so much as it should have been to the large agricultural community in the North-Western Provinces and other places, and, sitting as a member of the Revenue Board for the North-Western Provinces, and as a Commissioner, he had found cases in which a landlord and tenant had been quite happy under an unregistered lease, and for some time that lease had been acted upon by both parties. But, all of a sudden, the landlord wanted to enhance his rent ; the tenant would not agree, and then the landlord turned round and said " Your lease ought to have been registered." He brought a suit into Court, and he gained it because the lease was not registered, and the tenant could not contest his claim. Then there was another section in Mr. Justice Cunningham's remarks to which he would refer.

His Honour THE LIEUTENANT-GOVERNOR here observed that he understood from His Excellency just now that Mr. Plowden's motion was to be confined to the postponement of the passing of the Bill : he submitted that he was not in order in commenting upon its general provisions.

His Excellency THE PRESIDENT said that he was of the same opinion, but, at the same time, he thought it fair to Mr. Plowden to allow him to establish the grounds on which he rested his motion.

MR. PLOWDEN said that, if that was the case, he was perfectly willing to drop further discussion on this part of the question ; it was not to the legal aspect of the Bill that he

took exception ; that was altogether another question. But he was bound to allude to another point, which had an important bearing upon the question which would shortly come before the Council, namely, that this Bill do pass. To make his remarks clear he must digress. The motion now against his name on the notice-paper was not that he had intended to move. As originally drafted, it stated his wish that the Bill should be considered again when the Council re-assembled in Calcutta. That would give a clear period of eight months, in which certain events, which he would call attention to, might occur. Though the motion was placed on the list of business circulated on Monday in that shape, he had subsequently ascertained from the Secretary in the Legislative Department that, in his opinion, he (MR. PLOWDEN) was out of order in bringing forward such a motion ; and, accordingly, he changed the form of the motion to that in which it stood at present, and he hoped it would answer his purpose. His object, briefly stated, was to secure a further reasonable period of time within which endeavours might be made to elicit from the representatives of the Native community a larger expression of their views on the merits of the Bill, particularly in connection with their several local customs and laws. It was not his wish to obtain further criticisms on the legal aspects of the Bill, though that might be desirable. His motion, as it stood, did not go so far as he wished ; but, if it was assented to, and if, as he hoped, the facts which he had now put forward would justify the Council in accepting it, he could safely leave it to the Executive Government to determine the time which would be necessary to secure to the Bill more extended publicity, and to endeavour to elicit a larger volume of Native opinion than the Council now possessed. The Hon'ble Member in charge of the Bill had dwelt on the publicity which the Bill had obtained. He would turn to that point shortly. The Bill dealt with the every-day transaction of life of a very large community, and would affect, more or

less, the affairs of a very large section of their Native fellow-subjects. Every man who had property which he wished to transfer, however small it might be, would be touched by the provisions of the Bill. In these circumstances, when he learnt that the Bill was coming on for final discussion, he made it his business to see to what extent the Bill would affect those interests, to what extent Native opinion had been obtained on it, and how far the Bill had attained practical publicity. With that object he communicated with the Secretary in the Legislative Department, and he pointed out to MR. PLOWDEN the sources from which he could obtain the information he desired, and subsequently informed him that the number of Native gentlemen who had submitted opinions on this very important measure was 19. It struck him that, considering the very large population that the Bill affected, that was a very scant expression of Native opinion. If the Panjàb and British Burma, to which the Bill was not ordinarily applicable, were left out of consideration, the Council had received one opinion to about 10 millions of people of the country. He did not call that a very large expression of opinion. He never thought for a moment that these 19 gentlemen were the only Native gentlemen who had given the Council the benefit of their opinions on the Bill, and he thought it was very natural to come to the conclusion that it was only in reference to the last Bill which was marked No. V. which was circulated at the end of 1879, that these 19 opinions had been collected. So he turned to the sources of information to which he had been referred, and reflecting upon the whole matter, the result of his inquiry astonished him. There were not 19 but 21 opinions, and that was all. Ever since the Bill had been before the Council in different shapes, the Government had only succeeded in eliciting from 21 Native gentlemen their opinion upon the matter. It was true the Council had opinions from a great number of officials who, from their point of view, were able to

give them, but that was not what the Council wanted. They were legislating for a large Native population, and he should like to see what their opinion was on the subject.

There were one or two other points to which he should like to draw the attention of the Council. He found that, of these 21 Native gentlemen, 18 were Government officers; there were, therefore, only three independent views expressed. Then he found that of these 21 Native gentlemen, five belonged to Bengal, four to Mysore, three to the North-Western Provinces and Oudh, three to Madras, three to the Panjáb, which was out of the scope of the Bill, one to Ajmer and two to Sindh. There was not a single expression of opinion as to Bombay, and he Therefore congratulated the Hon'ble Member in charge of the Bill that he had been able to exempt Bombay from the operation of the Bill. Well, he had no doubt that he would be met with the argument that it was not a fair measure of publicity to point to the number of Native opinions that had been obtained. In fact, he had been told so. But he did not think that the gentlemen in the Council thoroughly understood what the extent of this publicity was. He would endeavour to make it clear how far the Bill had been published. He was aware that the practice was, in consonance with the standing orders of the Council, that Bills should be translated and published in the vernacular Gazettes, and he supposed it was assumed, by gentlemen who considered that sufficient publicity had been given to the Bill, that, in consequence of these translations being published, the people got a very fair view of what was going on, and that, if they wished to address the Council with reference to any objections which they might wish to offer, they would have the opportunity of doing so. But he did not think that was at all the case. It was not possible to obtain much publicity by printing Bills in the vernacular Gazettes. He was only able to ascertain, from the printers of the *Bengal* and *North-Western Provinces Gazettes*,

to what extent the vernacular copies of the Gazettes were circulated to private individuals. He thought members of Council here would be somewhat surprised to hear the result of the enquiry he had made so far as Bengal and the North-Western Provinces and Oudh were concerned. He found that the number of private subscribers to the vernacular Gazettes in Bengal was 174. He also found that in the North-Western Provinces and Oudh the number of vernacular Gazettes issued to private individuals was 205. They were reckoned in this way, There were 173 private subscribers for the *Bengalí Gazette*, and there was one gentleman who took in the *Hindí Gazette*. He could obtain no information regarding the *Uriya Gazette*, but he did not think it circulated more widely than the *Hindí-Gazette*. Then, in the North-Western Provinces and Oudh, where the Gazette was published in Urdú, 205 gentlemen—some of these might be officials—took in that Gazette. Now, it was a matter of arithmetic. There was one vernacular Gazette issued to every 300,000 persons amongst those which were circulated to private individuals; and, if the English copies of the Gazette which were also privately circulated were added, there would be about one to every 170,000. It seemed to be utterly misleading and an abuse of terms to talk of that as publicity. There was only this small number of private persons who took in these Gazettes, and how could it be thought that publicity was obtained for these measures by securing translations of them in the vernacular Gazettes? Then, there was another point. Hon'ble Members were not aware at what time these translations were issued. In one case, the vernacular Gazette—he thought it was the *Hindí Gazette* for Bihar—was not issued till December: so that it was impossible for a man, however anxious he might be to pay attention to a Bill of this kind, to give a competent opinion upon it by the 10th of January, which was the time when

the Bill was brought forward for final consideration in the Council.

His Excellency THE PRESIDENT said that, in the papers before him, he found it recorded that the last issue of the Bill was published in the *Hindí Gazette* on the 24th September and on the 1st and 8th of October last year. He thought the Hon'ble Member was alluding to the *Maráthí Gazette*, which was the only one in which the Bill was published in December.

The Hon'ble MR. PLOWDEN resumed. It appeared from the paper before him, which he had recieved from the Legislative Department, that the Bill was published in the *Hindí Gazette* on the 6th of December. He thought, therefore, that he had sufficiently pointed out that there had not been real publicity, and on that ground he was anxious that the final consideration of the Bill should be postponed. There was one other point to which he would like to draw attention. He was told yesterday that the British Indian Association asked for time to consider this measure, to enable them to bring forward their objections to the Bill, and they were met with a flat refusal. He would, therefore, move that the Bill as amended by the Select Committee be republished.*

His Honour THE LIEUTENANT-GOVERNOR said that he had no desire to bring forward any motion which should have the effect of obstructing the passing of the Bill, but he should have been very glad if the Hon'ble Member had seen his way to acceding to a request which he had made to him to postpone his motion for the passing of the Bill. Of course, there might be very strong reasons for pushing on the measure with such extraordinary haste; but these reasons were entirely unknown to any one not belonging to the Executive Council. No reason of any cogency had been assigned to the Council generally. Assuming that such reasons did exist, and that they were strong reasons, he should not make any formal motion in

opposition to the passing of the Bill, or urge, in support of his view, rule 29 of the Standing Order of the Council, which provides that the Report of a Select Committee should be in the hands of the Council seven days before a motion is made to pass a Bill. What he desired to say was more in the way of general remonstrance. There was, no doubt, a very strong feeling springing up in the mind of the public, and it was a feeling which he entirely shared, that a number of measures were being hurried through the Council with unwarrantable haste. To prove how very necessary it was that due time should be given for the consideration of the Reports of Select Committees, and to show the inexpediency of hurrying Bills through Council, it was only necessary to refer to what had occurred since last week in respect to this very Bill. There was a motion on the notice-board at their last meeting that day week for passing the bill. Fortunately, a strong difference of opinion occured as to the working of section 69, and this difficulty—and this difficulty only—led to the postponement of the passing of the Bill into law last Thursday. The delay, however, of one week had brought forward such strong opposition to the Bill from Bombay, that, in the Bill as amended this week, Bombay was exempted from its provisions. He had not been favoured with a sight of the Bombay remonstrance, but it was evidently considered to be of such force as to compel the Government to omit Bombay.

The Hon'ble MR. STOKES explained that, under the general orders of the Secretary of State to exempt any Local Government which objected to the provisions of the Bill, the objections of the Bombay Government were accepted as a matter of course.

His Honour the LIEUTENANT-GOVERNOR replied that that did not affect his position. The objection must have been held to have had some force in it, and to be a substantial objection, or it would not have come within the scope of the

permissive in their application, but that they should be subject to the closest examination before they were placed on the Statute-book. No formal suggestion of this kind had been made in Council at the last meeting, but, as regards the proposal now put forward, he was justified in saying that, in fulfilling the desire of the Secretary of State in the matter, the Government were fulfilling their own wish that important Bills of this kind should not be passed with any rapidity, and that they should yield to any reasonable request that further time should be given for the expression of Native opinion and other opinions on it.

The Hon'ble Mr. Stokes said that he had no objection to postpone the motion for the passing of the Bill for three weeks.

His Excellency the President said:—"There seems to be a very broad distinction between the suggestion thrown out by my hon'ble friend the Lieutenant-Governor and the motion of my hon'ble friend Mr. Plowden. That motion is one for delaying the passing of this Bill for a very lengthened period. Most of the observations made by him in support of that motion consisted of criticisms, which may be perfectly just in themselves—though I am not convinced that they are—against the whole mode of procedure of this Legislative Council in regard to the publication of Bills. He says that our methods of publication fail to secure effectual publicity, and that a very small number of persons in the country know what legislation is going on in this Council.

"That, I dare say, broadly speaking, is very true, and even with all the publicity of Parliament and the Press at home, I would venture to say that a very small numerical proportion of the people of England know what Bills are passed in Parliament. No doubt, that proportion is very much smaller in this country, and my wish is that the utmost publicity should be given to every measure brought into this Council. But when my hon'ble friend says that these Bills are only

published in certain Vernacular Gazettes, and mentions the number of persons who take in those Gazettes, it appears to me that he omits from his calculation the rest of the Vernacular Press. Now, the Vernacular Press, at all events, should be acquainted with those Bills as published in the Gazettes, and if such Bills do not come into the hands of the writers in that Press, then I venture to say that those gentlemen do not give sufficient attention to an important part of their public duties. Be that as it may, however, of course the Government, and the legislature particularly, can only take certain recognised methods of affording to the public the opportunity of knowing what is going on in this Council, and it rests with the public to avail themselves of that opportunity, or not, as they think desirable. All we can do is to give to the Press and the public sufficient means of informing themselves in respect to such Bills as are before this Council, and confess that I do not at present see how it be possible to materially change a practice which has been in existence for a very long time in regard to the publication of such Bills.

"If, however, my hon'ble friend Mr. Plowden will make suggestions with a view to obtaining greater publicity for Bills brought into this Council, we shall be glad to consider them, provided they are such as the Government can adopt.

"As regards this particular Bill, the fact is that leave was given to introduce it on the 31st of May, 1877, and that we have now arrived at the 26th of January, 1882, which is very nearly five years since the Bill was introduced. I find that the Bill has been published four successive times in such newspapers or Gazettes as the Local Governments thought fit, and it seems to me that according to the ordinary and general modes of publication, and to the course followed with regard to other legislative measures during that period, this Bill has had a large amount of publication and has been for an unusually lengthened period before the public. I therefore very much doubt whether any further publication would be likely to elicit

any additional opinion regarding the measure. I quite understand the advantage of such a delay as my hon'ble friend the Lieutenant-Governor suggests, because public attention is now directed especially to this matter, and, no doubt, within a period of three weeks, a considerable expression of public opinion, favourable or unfavourable, may be brought forward; and I think it therefore perfectly reasonable to accede to that proposal. On the other hand, I consider that such a proposal as my hon'ble friend Mr. Plowden makes would fail to secure the object which he desires. If, as he proposes, the measure is postponed for another year, the result will probably be that in the interval people will not have attended to it any more than they have hitherto, and that, when it comes up again, at the last moment they will examine it as a perfectly fresh matter and start all the same objections to it over again.

"Now, I am very sensible of the necessity for affording every opportunity for the expression of public opinion on a measure of this kind, but of course no one can conceal from himself that it is perfectly possible, by postponing the consideration of such a measure till the very last moment and then asking for an indefinite delay, to bring about the same result as would be accomplished by moving for its rejection, or practically to shelve the Bill altogether. I do not for a moment say that this is the case here. Nevertheless, I quite admit that, if a case has arisen for postponement—and my hon'ble friend the Lieutenant-Governor says it has—we ought not unduly to press on the progress of the measure.

"In conclusion, I would only point out that, so far as the discussion upon the Bill has gone to-day.—and it has been discussed by men of great talent and large experience,—that discussion has been favourable to the Bill as it stands. This debate will be of great advantage to the public; it will guide their opinion in respect to the Bill; it will tend to remove certain impressions which appear to exist in the public mind;

and, therefore, though I cannot agree to the motion of my hon'ble friend Mr. Plowden for a lengthened postponement, I am quite willing to agree that the Bill should be postponed for three weeks."

His Honour THE LIEUTENANT-GOVERNOR asked the permission of His Excellency the President to say a few words on the question of publicity. Although it was quite possible that only a certain number of the vernacular Gazettes might be circulated amongst the Native community, the people who really gave publicity to Bills which were introduced into this Council were the members of the legal profession. Those who were most competent to give an opinion were the pleaders of the various Courts in the mufassal; they criticised the Bills and brought them to the notice of the zamíndárs and others who were their clients. So that, really, Bills were published to a much greater extent than appeared from the figures which had been given to the Council.

The Hon'ble MR. PLOWDEN said that, if the passing of the Bill was deferred for a period of three weeks, he was quite willing to withdraw his motion.

The Hon'ble MR. STOKES wished to explain the circumstances connected with the memorandum of Sir James Stephen which the Hon'ble Mr. Plowden seemed to think had been improperly withheld from hon'ble members. In December, 1878, the Government of India, having determined to appoint a Law Commission, requested the Secretary of State to invite Sir Henry Maine and Sir James Stephen to favour it with their opinion upon four matters, the selection of subjects for codifying the order in which those subjects were to be taken up, the general arrangement of the Code and the applicability of its various parts,—matters on which the Government of India had, in May, 1877, fully expressed its views,—in order that that opinion might be laid before the Commission. Accordingly, in July, 1879, the Secretary of State sent the Government of India a

despatch containing a minute by Sir Henry Maine and one by Sir James Stephen, the latter of which contained, not merely an opinion on the question submitted to him, but also criticisms on the Transfer of Property and the other five Bills submitted to the Law Commission. These minutes were laid before the Commission and carefully considered, and Sir James Stephen's criticisms were, MR. STOKES thought, sufficiently answered in the second part of its Report. It was not the custom of the Government of India to publish minutes made for such a purpose—certainly in the present case they should not be published without the authors' consent; for Sir Henry Maine's memorandum contained a long extract from an unprinted essay of his on the influence exerted upon law by the continental systems of land-registration; and Sir James Stephen's memorandum was hardly calculated to advance that learned judge's reputation. But, if any hon'ble member wished to see those minutes, he could do so at the Legislative Council House.

As to Sir Richard Garth's minute, which the Hon'ble Mr. Plowden seemed to think had also been kept back from the Council, all he could say was, that that minute was written last November, that the learned author, with his usual courtesy, sent him (MR. STOKES) a copy in his private capacity, that the criticisms which it contained had been most carefully considered both by the Hon'ble Mr. Evans and himself, and that some of the changes which it suggested had been made in the Bill. But Sir Richard Garth never sent his minute to the Legislative Department, and must, therefore, be taken not to have wished its publication. He had apparently modified his views as quoted by Mr. Plowden, for MR. STOKES had the best authority for saying that the learned Chief Justice now considered the Bill on the whole a very good Bill, though, of course, it had its faults, that it was calculated to do much good, and that he hoped it would be passed at once.

to Mr. Justice Cunningham's opinions, which had been

referred to by the Hon'ble Mr. Plowden, MR. STOKES might add one or two remarks to those made by the Hon'ble Mr. Crosthwaite. Mr. Cunningham asserted that the definition (in section 5) of "transfer" was inaccurate, because "the following sections show that many transfers are to persons not in existence at the time of the transfer," This was not so. Interests might under the Bill be provided for unborn persons, but in such case the transfer was made to living trustees for their benefit. He said that illustration (*b*) to section 26 and illustration (*b*) to section 27 were doubtful law. The former was taken from illustration (*e*) to the Succession Act, section 115, which had been framed by the great judges and lawyers whom he (MR. STOKES) had mentioned in his former speech; the latter from the illustration to section 117 of the same Act, which again was drawn from the decision, in *Underwood* v. *Wing*, 4 D. M. G. 633, of Lord Cranworth assisted by Mr. Justice Wightman and Mr. Baron Martin.

Mr. Cunningham again, said that "no question has been more fully discussed than the position of the mortgagee who has sued on his mortgage and recovered a money-decree..... The Bill simply ignores the point." He had not, MR. STOKES feared, read the Bill which he criticised. There was a section (99) solely devoted to this point and settling it, MR. STOKES ventured to think, in a satisfactory manner. Then, Mr. Cunningham said—"The question, again, as to the interest which passes at a sale in execution of an auction-decree is not free from obscurity"; and took the Bill to task for saying nothing about it. What he meant by "sale in execution of an auction-decree" was not very apparent. He could hardly mean a sale made under a decree passed by a corrupt judge who had set his decision up to auction. He probably meant an auction-sale in execution of a decree; but to deal with this matter was outside the express scope of the Bill, and should be dealt with, if at all, by an amendment

of the Code of Civil Procedure. He said that Chapter VIII was "very inadequate. It lays down no general rule or principle as to transferability of actionable claims." The reason was that the rule was already laid down in its proper place, namely, section 6. Subject to the provisions in that section, clause (*h*), and in sections 131, 132 and 136, all actionable claims would be transferable except mere rights to sue for a fraud or for harm illegally caused. But MR. STOKES would not waste the time of the Council by noticing any more of these criticisms.

The Hon'ble MR. PLOWDEN asked for leave to withdraw the Motion that the Bill to define and amend the law relating to the Transfer of Property as amended by the Select Committeee be republished.

Leave was granted.

The Hon'ble MR. STOKES also asked for leave to postpone for three weeks the Motion that the Bill, as amended, be passed.

Leave was granted.

The Hon'ble MR. STOKES moved that, in section one, line four, of the Bill to define and amend the law relating to the Transfer of Property, for the word "April," the word "July," be substituted. He said that in the case of this Bill it was desirable that the translations into the native languages should be made with special care and the object of this amendment was to give time for that purpose, and also for the making by the High Courts, under section 104, of subsidiary rules for carrying out the provisions of the mortgage-chapter of the Act.

The Motion was put and agreed to.

The Hon'ble MR. STOKES asked for leave to withdraw the Motion that, in section eighteen, line eleven, of the same Bill for the words "one year" the words "ten years" be substituted, and that in the next following lines for the word "year" the words "said ten years" be substituted. He said that it had been

represented by a gentleman whose opinions were deserving of much attention, that, in the case of Hindús, further consideration of the question as to the period during which accumulation should be allowed was desirable.

His Excellency THE PRESIDENT said that he thought this matter was deserving of attention, and that consideration would be given to it. His present opinion was in favour of the amendment.

Leave was granted.

The Hon'ble MR. STOKES also moved that, in section eighty-eight, paragraph two, line one, of the same Bill, after the word "succeeds" the words "and the mortgage is not a mortgage by conditional sale," be inserted. He said that the object of the amendment was to correct a clerical error for which he alone was responsible. Section eighty-eight, paragraph two, provided for sales by the Court, under certain circumstances, of mortgaged property the subject of a suit for foreclosure. Now, mortgagees by conditional sale could not under any circumstances sell the mortgaged property; and it was not intended that they should do, indirectly, through the Court, what they themselves could not do directly.

The Motion was put and agreed to.

The Hon'ble MR. STOKES then moved that the Bill, as amended, be passed.

The Hon'ble DURGA CHARAN LAHA said that, when this Bill was brought up before the Council three weeks ago, he took occasion to thank the Select Committee for excluding Hindús and Buddhists from the scope of chapter II so far as their personal laws were concerned; but there was one important point which he wished to bring to the notice of the hon'ble Council on the present occasion.

Section 1, in the first place, exempted from the operation of the law the territories administered by the Governments of Bombay, Panjáb and British Burma, but left it to the discretion

of those Local Governments to extent it to the whole or any part of their territories as they might deem fit. This, in his humble opinion, was highly objectionable on principle. As he understood the constitution of this Government, all laws ought to originate with the legislature, but this section practically left the task of legislation in this matter to the discretion of the Executive Governments of the provinces named. The Executive Government, as the Hon'ble Council was well aware, was differently situated from the Legislative Council, and it was not bound by any such standing orders as required this Council to allow the public a fair opportunity to discuss a measure before it was passed into law. None had shewn a more laudable anxiety than His Excellency to give the public the fullest opportunity for the discussion of legislative measures, and DURGA' CHARAN LA'HA' believed the provisions of section 1, as he had explained, could not be in consonance with His Excellency's views. He did not wish to move an amendment on the subject, but left the matter to the consideration of the Hon'ble Council.

The Hon'ble MR. PLOWDEN said that he would like to say a few words in reference to this Bill, as he had intended to oppose the passing of the measure to-day. But the amendment which was placed first in the notice-paper had relieved him of that unpleasant duty, and he found that he was no longer obliged to oppose the Bill. Only last Thursday fortnight, while discussing this Bill, one of the members who spoke referred to the objectors of the Bill as properly falling within one of two classes—one class who objected altogether to the principle of the Bill, and another who objected to the measure itself. But the hon'ble gentleman omitted to notice the large section who objected to the Bill not because it was a bad Bill,—the Bill might be a good Bill,—but because it had not received that amount of publicity which it ought to have received, and also because they feared that, if it was passed at the time when it

was intended to be passed, the change in the law would take effect in a very short period, and large masses of the people would suddenly find a change regarding which they had received no notice whatever. The first of the amendments which was carried to-day took the best part of the sting out of these objections, because it provided for the Act coming into operation from July instead of from April next. That gave four months' time, within which the Local Governments would be quite able to take measures to have the law properly promulgated and explained to the people, and MR. PLOWDEN had no doubt that that would be done. Under these circumstances, he would no longer oppose the passing of the Bill.

The Hon'ble MR. INGLIS said that he had intended giving a silent vote, but he felt called upon to indorse the views expressed by the Hon'ble Durgá Charan Láhá as to the inexpediency of the principle embodied in the first section of the Bill, which permitted its extension by mere executive order of the Local Government to territories to which it did not at present extend. He thought such extension should only be permitted in the regular way by an Act of this Council. As to the present Bill, he felt it difficult for a non-professional person like himself to express an opinion. So far as he could judge, the chapter relating to mortgages, and particularly the sections relating to rights and liabilities of mortgagees and to foreclosure and sale, would effect distinct improvements in the present law. The argument which had most weight with him in deciding to support the Bill was that brought forward by the Hon'ble Mr. Crosthwaite when the measure was last before the Council, that it would greatly help Mufassal Judges in the administration of justice to have the law on the subject of transfer of property stated in a concise form as was done in this Bill. For these reasons he had decided to support the passing of the measure.

His Excellency THE PRESIDENT said :—"Before this Bill passes I should like to say a few words with respect to what fell

from my hon'ble friends, Bábú Durgá Charan Láhá and Mr. Inglis, regarding the mode in which it is proposed, in accordance with precedent, to extend this Bill to other parts of the country than those to which it has been made immediately applicable. If any notice of amendmendment on that point had been placed on the paper, it would have most certainly received the careful attention of the Government; but, as no such notice has been given, the point cannot now be practically considered. With regard, however, to the general question, I do not wish to lay down any hard and fast rule, or to pledge the Government, as to the course which it may take in regard to future Bills. That course must be regulated by the nature of each particular Bill and the circumstances of the time at which it may be proposed to the Legislative Council. I have also one other point to mention. In the course of the discussion three weeks ago, there appeared to be some doubt in the minds of members of Council as to what was the opinion of a very distinguished person in this city—the Chief Justice of the High Court—with reference to this Bill. Of course any opinion entertained by Sir Richard Garth is entitled to so great weight by the Government that I felt it my duty to ascertain what his opinion in regard to this measure was. I accordingly addressed to him the following note :—

"'MY DEAR SIR RICHARD,—There appears to be an impression in the minds of some persons that you disapprove of the Transfer of Property Bill now before the Legislative Council.

"'It would greatly assist me in deciding what course it would be desirable to pursue with that measure if you would let me know what you think of it in its present shape, and whether in your opinion it ought to be passed into law without further delay, or should be postponed for another year.

"'Yours sincerely,

"'(Sd.) RIPON.'"

"*Calcutta, 8th February*, 1882."

"To that letter I received the following answer :—

"'MY DEAR LORD RIPON,—I beg to acknowledge the receipt of your letter, and to say, in reply to it, that on the whole I do approve of the Transfer of Property Bill, and trust that it may be allowed to pass into law without further delay,

"'I feel grateful to Your Excellency for having given me an opportunity of expressing this opinion. I fear that my views on the subject were somewhat misrepresented on the occasion of the late debate upon the Bill: and I should be extremely sorry if any critical remarks which I may have made in my note of November last were in any degree the means of retarding the progress of a measure which, I believe, will prove a real blessing to the people of this country.

"'The remarks to which I allude applied rather to the principle upon which the Indian Law Commissioners in England have been in the habit of framing laws for India, than to any special defects in this particular Bill.

"'I have no desire to criticise the numerous objections which have been made to the Bill by my good friend and colleague Mr. Cunningham. Suffice it to say, that for the most part I do not agree with him, and I believe that, if a Bill were framed in accordance with his views, it would not be nearly so good a measure as that which is now before Your Excellency's Council.

"'A perfect Bill upon such a subject is probably out of the question, and it is as difficult in codification as it is in other things to please everybody; but, having regard to the length of time during which this Bill has been under consideration, the careful and repeated discussion which it has undergone, and the pains which have been bestowed upon it by the highest authorities in the land, I think that any further postponement of the measure can lead to no profitable results.

"'No man, I believe, has ever protested more strongly than I have against hasty and ill-considered legislation in such matters, and I am afraid that my excellent friend, Mr. Stokes, has often looked upon me as one of his most determined opponents. But it can hardly be said, with any show of reason, that this Bill has not received its due meed of consideration; and I was indeed rejoiced to find that Sir Michael Westropp, although not approving of the Bill for the Presidency of Bombay, paid a just and generous tribute to the ability and earnest industry which has been displayed in the preparation of it, and which, whether we agree with him or not, we must all feel that our friend the Legal Member of Council most fully deserves.

"'I am,

"'My dear Lord Ripon,

"'Very sincerely yours,

"'(Sd.) RICHARD GARTH."

"'33, Theatre Road;

"'15th *February*, 1882.

The Motion was put and agreed to.

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ACT IV OF 1882.

TRANSFER OF PROPERTY ACT.

An Act to amend the law relating to the Transfer of Property by act of Parties.

Received the assent of His Excellency the Governor-General on the 7th February 1882.

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; it is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Transfer of Property Act, 1882;"

Commencement.

It shall come into force on the first day of July, 1882;

Extent.

It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council the Lieutenant-Governor of Panjáb and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend this Act to the whole or any specified part of the territories under its administration.

And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the

local official Gazette, exempt, either retrospectively or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections forty-one, fifty-four, paragraphs two and three, fifty-nine, sixty-nine, one hundred and seven and one hundred and twenty-three.

Repeal of Acts.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Act IX of 1872 Sec. 1.

Saving of certain enactments, incidents, rights, liabilities, &c.

(*a*) the provisions of any enactment not hereby expressly repealed :

(*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

4 Beng. A.C. 219.

(*c*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or,

I. L.R. 2 Bom. 541.

(*d*) save as provided by section fifty-seven, and chapter four of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction : and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindú, Muhammadan or Buddhist law.

Interpretation-clause.

3. In this Act, unless there is something repugnant in the subject or context,—

"immoveable property"

"immoveable property :"

"immoveable property" includes timber, growing crops or grass :

"instrument :"

"instrument" means a non-testamentary instrument :

"registered :"

"registered" means registered in British India under the law for the time being in force regulating the registration of documents :

"attached to the earth :"

"attached to the earth" means—

(*a*) rooted in the earth, as in the case of trees and shrubs ;

(*b*) imbedded in the earth, as in the case of walls or buildings ; or

(*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

"notice :"

and a person is said to have "notice" of a fact (1) when he actually knows that fact, or (2) when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when (3) information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

Contract Act S. 229. as to agent.
4 Cal. 312.
11 Beng. 54 P. C.

Enactments relating to contracts to be taken as part of Act IX of 1872.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

CHAPTER II.

Of Transfers of Property by act of Parties.

(A).—Transfer of Property, whether moveable or immoveable.

"Transfer of property" defined.

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act.

What may be transferred.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:

Carlton V. Leighton Cf. Act X of 1877 S. 266 Cl. K.

(*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

Smith V. Packhurst

(*b*) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(*c*) An easement cannot be transferred apart from the dominant heritage,

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(*e*) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(*f*) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable. Cf. 11 & Vic. Cap. S. 27.

(*g*) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

Persons competent to transfer.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

Operation of transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. 2. W. R. 14 W. R. 3

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ; N. W. P. 1(p. 251. 24. W. R. 3

and, where the property is machinery attached to the earth, the moveable parts thereof ; Morley N. 259.

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors,

windows and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

7 Exch s. 58.

Oral transfer.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

L. R. Chan. Div. 148, 285.

Condition restraining alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindú, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Act X of 1865 S. 125.

Restriction repugnant to interest created.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall

be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Condition making interest determinable on insolvency or attempted alienation.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Transfer for benefit of unborn person.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

Rule against perpetuity.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Act X of 1865 S. 101.

Transfer to class some of whom come under sections 13 and 14.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class.

Bentick V. Duke of Portland, 7 Chan 693.

Transfer to take effect on failure of prior transfer.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer in perpetuity for benefit of public.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Direction for accumulation.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void,

Act X of 1866 S. 104. Donaldson V. Donaldson L. R. 3. Chan Div. 743.

and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

Vested interest.

19. Where, on a transfer of property, an interest therein is created in favour of a person (1) without specifying the time when it is to take effect, or (2) in terms specifying that it is to take effect forthwith or on (3) the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby (1) the enjoyment thereof is postponed, or whereby (2) a prior interest in same property is given or reserved to some other person, or whereby (3) income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a (4) particular event shall happen the interest shall pass to another person.

When unborn person acquires vested interest on transfer for his benefit.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Act X of 1865 S. 107.

Contingent interest.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Act X of 1865 S. 108.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Act X of 1865 S. 111.

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Act X of 1865 S. 112.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Act X of 1865 S. 113, 114. Act IX of 1871 S. 25.

Conditional transfer.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(*a*). A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(*b*). A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(*c*). A transfers Rs. 500 to B on condition that he shall murder C. The transfer is void.

(*d*). A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Act X of 1865 S. 115.

Fulfilment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(*a*). A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(*b*). A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Act X of 1865 S. 116.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Act X of 1865 S. 117.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(*a*), A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(*b*). A transfers property to his wife; but in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of A does not take effect.

Act X of 1865 S. 118.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest therein may be created to to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

Act X of 1865 S. 119.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age without C's consent. The transfer to D takes effect.

Act X of 1865 S. 120.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

Act X of 1865 S. 121.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section twelve, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(*a*). A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the firm.

(*b*). A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Act X of 1365 S. 122.

Such condition must not be invalid.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act. Act X of 1865 S. 124.

Transfer conditional on performance of act, no time being specified for performance.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Transfer conditional on performance of act time being specified.

Election.

35. Where a person professes to transfer property which he has no right to transfer, and as part Act X of 1865 S. 168.

Election when necessary.

of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it ; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustration.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1.000 pay Rs. 800 to B.

Act X of 1865 S. 169.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

Act X of 1865 S. 171.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

Act X of 1865 S. 172.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances. Act X of 1865 S. 173.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent. Act X of 1865 S. 174.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done. Act X of 1865 S. 175.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to Act X of 1865 S. 176.

dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

Act X of 1865 S. 177.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the countrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such paymets, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners, in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially

increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(*a*). A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(*b*.) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A, B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

B.—Transfer of Immoveable Property.

Transfer by person authorized only under certain circumstances to transfer

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for

consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascer-

the existence of such circumstances,

in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in

his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages trasferred to C.

Burden of obligation imposing restriction on use of land.

40. Where, for the more beneficial enjoyment of his own immoveable property, third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of that contract. B may enforce the contract C to the same extent as against A.

Transfer by ostensible owner.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such

Act IX of 1872 S. 108, exception 2.

property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Transfer by person having authority to revoke former transfer.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its vaule. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Transfer by one co-owner.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family, is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Joint transfer for consideration.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively

entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Transfer for consideration by persons having distinct interests.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(*a*). A, owning a moiety, and B and C, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(*b*). A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners of share in common property.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights can not all exist or be excercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights created by transfer.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually received under the policy, or so much thereof as may be necessary, to be applied reinstating the property.

Transferee's right under policy.

Act XI of 1855 S. 1.

Rent *bonâ fide* paid to holder under defective title.

50. No person shall be chargeable with rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Act XI of 1855 S. 2. 2 Bomb. 225.

Improvements made by *bonâ fide* de-

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to

free ingress and egress to gather and carry them.

Transfer of property pending suit relating thereto.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

8 Beng 478.
7 Mad. 111.
11 Bomb. 24, 64 139.
N. W. P. 1867 p. 301.
10 W. R. 469.
7 W. R. 225.
15 W. R. 372.
23. W. R. 382.
2 Tayler and Bell 113.
10 O' Ken 303, 309.
5 W.R.P.C.63.
8. Bomb. A C. J. 61.

Fraudulent transfer.

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Cf. Act 1 of 1877 S. 35.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

CHAPTER III.

Of Sales of Immoveable Property.

"Sale" defined.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

14. Beng. 307, 312; N. W. P. 1866 p. 87. 12. W. R. P. C. 6. W. R. 1864. p. 222. 5. W. R. 248. Morley N. S. p. 358. N. W. P. 1868 p. 376.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

Rights and liabilities of buyer and seller.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(1) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover ;

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(*f*) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

provided that (*a*), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all and (*b*), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers as the case may be, and at the cost of the person making the request, to produce said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime,

the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer;

(*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5). The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(*b*) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(*c*) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(*d*) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(*a*) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(*b*) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (*a*), and paragraph (5), clause (*a*), is fraudulent.

Sale of one of two properties subject to a common charge.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of

the other property, so far as such property will extend.

Discharge of Incumbrances on Sale.

Provision by Court for incumbrances, and sale freed therefrom.

57. (*a*) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court,

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks

fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(*c*) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(*d*) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(*e*) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV.

Of Mortgages of Immoveable Property and Charges.

Act XXVIII of 1866. S. 19: 23 & 24 Vic. C. 145.

58. (*a*). A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

"Mortgage," "mortgagor" and "mortgagee" defined.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Moo. I. A. 275, 306. Colb's Dig Bic III, t 96.

(*b*.) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necesaary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Simple mortgage.

(*c*). Where the mortgagor ostensibly sells the mortgaged property—

Mortgage by conditional sale.

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

Usufructuary mortgage.

(*d*). Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgaged-money the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

Macph. 8,12,59
R. B. Ghosh 218, 219.
2 Moo. I. A. 487.

English mortgage.

(*e*). Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Macph. p. 53.
R. B. Ghosh p 64.

Mortgage when to be by assurance.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected

only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karáchí and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem.

60. At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (*a*)[1] to deliver the mortgage-deed, if any, to the mortgagor, (*b*)[2] where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and [3](*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to[4] execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished;

5 Beng 450.
6 Beng 562.
2 Mad. 420.
7 Mad. 395.
13 Beng. 205
N. W. P. 186 p. 204.
9 Bomb. 69.
7 Beng P. 136.

8 Bomb. A. C. J. 265.
N. W. P. 1869 p. 128.

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

N. W. P. 1867 p. 88.
20 W. R. 387.
22 W. R. 262.
24 W. R. 24.
N. W. P. 1870 p. 4.
N. W. P. 1872 p. 92.
N. W. P. 1873 p. 148.
R. B. Ghosh p. 198.
15 Beng 303.

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

6 Bomb. A. C. J. 90.
R. B. Ghosh p. 330, 331.

Right to redeem one of two properties separately mortgaged

61. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for

Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

(*a*) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(*b*) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in court as hereinafter provided.

Accession to mortgaged property.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

10 Bomb. 369. 11 Bomb. 32. I.L.R. 5 Calc. 198.

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the pro-

perty from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

N. W. P. 1867. p 199

Renewal of mortgaged lease.

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Implied contracts by mortgagor.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,

(*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

S. D. A. 1859 p. 1195; 1853 p. 575.

(*b*) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged

property, pay all public charges accruing due in respect of the property ; N. W. P. 1869 P. 128,

and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exist and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;

(*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (*c*), or in clause (*d*), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

King V. Smith 2 Hare 243. Macph. 109. R. B. Ghosh 147.

Lewin on trusts P. 263.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the sucurity is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-haif, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

2 Mad.289. N. W. P. 1870 P. 311. 2. Bomb. 242. 7 Bomb. A. C. J. P. 146. 9 Bomb. 12.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

Right to foreclosure or sale.

A suit to obtain an order that a mortgagor shall be absolutly debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

N. W. P. 1869 p. 184. N. W. P. 1875 p. 55.

Nothing in this section shall be deemed—

(*a*) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary

mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale ; or

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure : or Fisher S. 518 757.

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage. Cases contra Macph. p. 191 196.

68. The mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only :— Rights to sue for mortgage-money.

(*a*) where the morgagor binds himself to repay the same : 6 W. R. 283.

(*b*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor : Macph. p. 233 Act XXXIV of 1871 S. 46. 25 W. R. 7. 4. Moo. I. A. p. 464. Marsh 209. 7 S. D. A. 47. N. W. P. p. 28. 2 Mad. 315. 6. W. R.

(*c*) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other persons.

Where, by any cause other than the wrongful act or default of the mortgagor, or mortgagee, the mortgaged property has been wholly or

partially destroyed or the security is rendered insufficient as defined in section sixty-six the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

8 Bomb A. C. J. p. 142. Macph. p. 2.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (namely)—

Power of sale when valid.

(*a*) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Buddhist;

(*b*) where the mortgagee is the Secretary of State for India in council;

(*c*) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karáchí or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor or, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exer-

cise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances if any, to which the sale is not made subject, or after payment into court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale ; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage ; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be

situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist.

11 Bomb. 32.
I. L. R. 5. Calc. 198.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary shall, for the purposes of the security, be entitled to such accession.

Accession to mortgaged property.

Illustrations.

(*a*). A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(*b*). A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Renewal of mortgaged lease.

Macph. p. 109 113, 250.
1 Bomb. 199, 203.
5. Bomb. A. C. J. 109, 116.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

Rights of mortgagee in possession.

(*a*) for the due management of the property and the collection of the rents and profits thereof;

N. W, P. 1867, p. 187.
1. W. R. 133.

(*b*) for its preservation from destruction, forfeiture or sale;

(*c*) for supporting the mortgagor's title to the property;

(*d*) for making his own title thereto gopo against the mortgagor; and,

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease ; 11 Moo. I. A. p. 241.

and may, in the absence of a contract to the contrary, add such money to the principal-money, at the rate of interest payable on the principal, and where no such rate is fixed at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property ; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with inerest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified, two-thirds of the amount that would be required in case of total destruction to reinstate the property insured. 23 and 24 Vi C. 145, S. 11. 2. Daw. 606.

Nothing in this section shall be deemed to authorize the motgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Charge on proceeds of revenue-sale.

73. Where motgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part. Macph. p. 1 234. 1. W. R. 27 16 W. R. 22

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of document) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Right of subsequent mortgagee to pay off prior mortgagee.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees, (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property.—

Liabilities of mortgagee in possession.

2 Bomb. 222. Act IX of 1872 S. 151. Fisher S. 1530.

(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own;

8 Chan. Div. 427. N. W. P. 1875 p. 100.

(*b*) he must use his best endeavours to collect the rents and profits thereof;

(c) he must, in the abenc e of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold ; 2 Bomb. 23 Macph. p. 1 119.

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ; 9. W. R. 4 4 Y. & C p. 507. Fisher S. 1

(e) he must not commit any act which is destructive or permanently injurious to the property ; Macph p. 1 119. 7. N. W. p. 436. 9 N. W, P.

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ; Act I of 18 S. 54.

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ; 2. Beng. P 55. 5. W. R. 271. Macph. 11

5 Bomb A. C. J. 196.
12 Bomb. 88.
. 386.
N. W, P. 1866 p. 132.
N. W. P. 1868 p. 153.
7. W. R. 244.
R. B. Ghosh p. 262.
2 Moo. I. A. Calc. 1

(*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respects thereof, shall, after deducting the expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due te him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

Macph. 159. 60.

(*i*) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court, as the case may be.

Loss occasioned by his default.

If the morgagee fail to porform any of the duties imposed upon him by the section, he may, when accounts are taken in pursuance of a decree made, under this chapter, be debited with the loss, if any occasioned by such failure.

10. Moo. I A. p. 340,

Receipts in lieu of interest.

77 Nothing in section seventy-six, clauses (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgage and the mort-

gagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principle money, or in lieu of such interest and defined portions of the principal.

Priority.

Postponement of prior mortgagee.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Evidence A
S. 115.
N. W. P. 18
p. 402.
4 Mad. 373.
2 Moo. I. A
p. 487.
11 W. R. 28
8 Bomb. A.
J. p. 50, 55.

Mortgage to secure uncertain amount when maximum is expressed.

79 If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the blance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000 B. & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

2 Beng. p 45.
5 Beng. 463.
11 W. R 310.

Tacking abolished.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate martgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section seventy nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Marshalling and Contribution.

Fisher S. 704
W. R. 1864 p. 374.
1 W. R. 353.
7 W. R. 483.
12 W. R. 114.
Macph. p. 205. 136.

Marshalling securities.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Fisher. S. 700.

Contribution to mortgage-debt

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute reteably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section eighty-one to the claim of the second mortgagee. Fisher S.

Deposit in Court.

Power to deposit in court money due on mortgage.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit may deposit in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage. Beng. Reg. I of 1798. S. 2. Macph. p. 17.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed if then in his possession or power, apply for and receive the money

and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

9 N. W. P. 1.
Macph 159, 160.

Cessation of interest.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court, as the case may be.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Suits for Foreclosure, Sale or Redemption.

14 Moo. I. A. 101.
1 W. R. 176:
21 W. R. 428.
Macph. 146:
Siton 1, 442.
Act X of 1877 s. 32.
5 Bomb. O. C. J. 76.
8 Beng. 104.
Marshall 292.
N. W. P. 1868 p. 144.

Parties to suits for foreclosure, sale and redemption.

85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

Foreclosure and Sale.

Decree in foreclosure suit.

86. In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the

plaintiff for principle and interest on the mortgage, and for his cost of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into court the amount so due, on a day within six months from the date of declaring in court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims ; and shall, if necessary, put the defendant into possession of the property ; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

87. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

Procedure in case of payment of amount due.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the

Order absolute for foreclosure.

mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff.

W. R. 91

Power to enlarge time.

Provided that the Court may, upon good cause shewn, and upon such terms if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, schedule IV. No. 129, for the words "Final decree," the words "Decree absolute" shall be substituted.

88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty six, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Decree for sale.

15 & 16 Vic. C. 86 S. 48.

Power to decree sale in foreclosure suit.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like

decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

89. If in any case under section eighty-eight the defendant pays to the plaintiff or into court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished.

Procedure when defendant pays amount due.

Order absolute for sale.

90. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

IV. Kent 207.

Recovery of balance due on mort-

Redemption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

Who may sue for redemption.

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property ;

W. R. 230. W. R. 230. (*b*) any person having any interest in, or charge upon the right to redeem the property ;

17 W. R. 272 (*c*) any surety for the payment of the mortgage-debt or any part thereof ;

(*d*) the guardian of the property of a minor mortgagor on behalf of such minor ;

(*e*) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot ;

(*f*) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property ;

Fisher S. 768

(*g*) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Code C. P. S. 461.

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

Decree in redemption suit

N. W. P. 1870. P. 207.

That an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to

him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree ;

that, upon the plaintiff paying to the defendant or into court the amount so due on a day within six months from the date of declaring in court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title,by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property ; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

93. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

In case of redemption, possession.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be

In default, foreclosure or sale.

debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if neeessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished :

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section ninety-two for payment to the defendant.

Power to enlarge time.

94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly

Costs of mortgagee subsequent to decree.

incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Macph. p. 146.

Charge of one of several co-mortgagors who redeems.

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Sale of Property subject to prior Mortgage.

Act X of 1877. S. 295.

Sale of property subject to prior mortgage.

96. If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Act X of 1877 S. 2[illegible]

Application of proceeds.

97. Such proceeds shall be brought into court and applied as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale :

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

Anomalous Mortgages.

Bomb. Reg. V. of 1827. S. 15
5 Beng. 272. per Couch C. J.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, or such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in section 58 clauses (*b*), (*c*), (*d*), and (*e*).

Attachment of Mortgaged Property.

99. Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

Attachment of mortgaged property.

Charges.

Charges.

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections eighty-one and eighty-two and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

Swinfen V. Swinfen 29 Beav. 199: Adams V. Angell, 5 Chan. Div. 634, 645. 7 Mad. 231. 14 W. R. 491 3 O'Ken. 184 5 Beng. 463. 11 Bom. 41.

Extinguishment of charges.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

Notice and Tender.

Service or tender on or to agent.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person

or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Notice, &c., to or by person incompetent to contract.

103. Where, under the provisons of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of court by, any person incompetent to contract, such notice may be served or tender or deposit made, accepted or taken by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of

serving or receiving service of such notice, or making or accepting such tender, or making or taking out of court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Power to make rules.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out in itself and in the Courts of Civil Judicature, subject to its superintendence, the provisions contained in this chapter.

CHAPTER V.

Of Leases of Immoveable Property.

Lease defined.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied in perpetui ty, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

5 Bomb. A. C. J. 179.
6 Bomb. 31.
7 Bomb. 111.
1 Beng. F. B. 25.
13 W. R. 190.
I. L. R. 2 Calc. 146.
4 Beng. App. 86.
12 Beng. 263.
N. W. P. 1873. p. 9.
Perry. 480.

Duration of certain leases in absence of written contract or local usage.

106. In the absence of a contract or local law or usage to the contrary a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Leases how made.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

Rights and liabilities of lessor and lessee.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property,

against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to property leased :—

A.—Rights and Liabilities of

1 (*a*) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover : 6 W. R. 314.

2 (*b*) the lessor is bound on the lessee's request to put him in possession of the property : 4 Beng. Ap 44. 15 W. R. 23 23 W. R. 12

3 (*c*) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruptoin.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. Cf. Act IX 1872 S. 93. 11 W. R. 27 12 W. R. 14

B.—Rights and Liabilities of the Lessee.

(*d*) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease : 8 Beng.. 5 C. L. R.

(*e*) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and perma-

nently unfit for the purposes for which it was let, the lease shall at the option of the lessee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(*f*) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :—

(*g*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

Re Thakur Chandra Paramanik Beng. F. B. 595.
8 Beng. 231.
14 Beng. 201, 205.

(*h*) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property in the state in which he received it ;

Act XIX of 1868. S. 46.
Act XVIII of 1873. S. 42.

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them.

5 S. D. A. 205.
5 Mad. 120,277

(*j*) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any

part of his interest in the property, and any transferee of such interest or part may again trnsfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. :

7 Beng. 152.
N. W. P. 187
p. 181.
12 W. R. 451.
16 W. R. 112.
6 S. D. A 67,
15 W. R. 449.

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of wards, to assign his interest as such tenant, farmer or lessee :

8 Beng 239
12 Beng 82.

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interferance with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

5 Beng.401,416
8. Beng.App70.
10 Beng. App. 41.
5 S.D.A.205.
15 W. R. 360.
17 W. R 416.
23 W. R. 298.
W.R. Sp. 1864, p. 36.
8 Chan. Div. 526.

(*o*) the lessee may use the property and its produces (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

(*p*) he must not, without the lessor's consent erect on the property any permanent structure, except for agricultural purpose :

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

14 W. R. 83.
24 W. R. 68.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him.

Rights of lessor's transferee.

Act XI of 1855 S. 1

4 Anne. C. 16 S. 10.

Provided that the transferee is not entitled to arrears of rent due before transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Exclusion of day on which term commences.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration of lease for a year.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to determine lease.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Determination of lease.

7 W. R. 28?

111. A lease of immoveable property determines-

(a) by efflux of the time limited thereby;

8Moo. I.A. 261 16 W. R. 147.

2 (*b*) where such time is limited conditionally on the happening of some event—by the happening of such event :

Marshall 166.

3 (*c*) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event —by the happening of such event :

3O'ken. 259but See 10 W.R.15 per. Peacock C. J.

4 (*d*) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

N. W. P. 1869 p. 45.

5 (*e*) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :

9 W.R. 147.

6 (*f*) by implied surrender :

Marshall. 250. 26 W. R. 403. 15 W. R. 227. 18. W. R. 465. 22 W. R. 148. 25. W. R. 147.

7 (*g*) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a little in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :

23 W. R. 238, 271.

8 (*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (*f*).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

112. A forfeiture under section one hundred and eleven, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting : W.R.F.B. 10. Marshall 25.

Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred : 2 Bomb. 73.

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. A notice given under section one hundred and eleven, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice to quit.

Illustrations.

(*a*). A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(*b*). A the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, N. W. P. 18 ex. O, C. J. 2 Bomb. 70. 8 W. R. 225

Relief against forfeiture for non-payment of rent.

the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs Act XVIII 1873. 8, 34 Cl. c. para.

of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture ; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurrd.

10 W, R. 384.
13 W. R. 281.
N. W. P. 1871 p. 63.

Effect of surrender and forfeiture on underleases.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be repectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under lessees or relief against the forfeiture is granted under section one hundred and fourteen.

3 Bomb. A. C, J. 27.
2 Beng. 263.
N. W. P. 1870. p. 224.
7 W. R. 152,
16 W. R. 185.
22 W. R. 394, 548.
23. W. R. 27.
25. W. R. 234.

Effect of holding over.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee, or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according

to the purpose for which the property is leased, specified in section one hundred and six.

Illustrations.

(*a*). A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(*b*). A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Exemption of leases for agricultural purposes.

117. None of the provisions of the chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

Of Exchanges.

1 Mad. 100.

"Exchange" defined.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an " exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such prope rty by sale.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

120. Save as otherwise provided in this chapter each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

1 Morley 105.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

CHAPTER VII.

Of Gifts.

122. "Gift" is the transfer of certain existing moveable or immoveable made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift" defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Acceptance when to be made.

Act III of 1877. S. 17 Cl. a.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by

Transfer how effected.

a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered. Act IX of 1872 S. 90.

124. A gift comprising both existing and future property is void as to the latter.

Gift of existing and future property.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several, of whom one does not

126. The donor and donee may agree that on the happening of ed event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked. I. L. R. 2 All 432.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(*a*). A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(*b*). A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

Act X of 1865, S. 110.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gifts.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

Illustrations.

(*a*). A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(*b*). A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the

Universal donee.

donor's whole property the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

Saving of donations *mortis causâ* and Muhammadan law.

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

Actionable claim.

130. A claim which the civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.

Transfer of debts.

131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

36 & 37 Vic C. 66 S. 25(
1 Mad. 150.
5 W. R. but See 10 N. W. P. cited by Macph.

Illustration.

A owes money to B, who transfers the debt to C. B. then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

132. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Notice to be in writing signed.

Fisher 116. Sichel & Raphael. 10 jur. N. S. 1165.

133. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

Debtor to give effect to transfer.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration to the amount or value of such consideration.

Warranty of solvency of debtor.

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Discharge of person against whom claim is sold.

Nothing in the former part of this section applies—

(*a*) where the sale is made to the co-heir to, or co-proprietor of, the claim sold ;

(*b*) where it is made to a creditor in payment of what is due to him ;

(*c*) where it is made to the possessor of a property subject to the actionable claim ;

(*d*) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

Incapacity of officers connected with Courts of justice.

136. No judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

Liability of transferee of debt.

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Mangles V. Discon. 3 H. L. Ca. ,. Fisher S. 1058

Illustration.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

Mortgaged debt.

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.

Dav. Com. H. 691, 692.

Saving of negotiable instruments.

139. Nothing in this chapter applies to negotiable instruments.

THE SHEDULE.

(*a*). STATUTES.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VII, c. 10.	Uses	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances ...	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances ...	The whole.
4 Wm. & Mary c. 16.	Clandestine mortgages ...	The whole.

(*b*). ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1855	Mesne profits and improvements.	Section 1; in the title, the words "to mesne profits and" and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866	Indian Trustee Act.	Section 31.
IV of 1872	Panjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act.	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	Specific Relief	In sections 35 and 36, the words "in writing."

(*c*.) REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798.	Conditional sales	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts: Interest: Mortgagees in possession.	Section 15.

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the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king.[n] But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an *enemy*: an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England.[n] And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity.[o] (8)

5. "If a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it on another, this is held to be only an abuse of the seal, and not a counterfeiting of it: as was the case of a certain chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and sir Edward Coke[p] mentions it with some indignation, that the party was living at that day. (9)